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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY,
LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver
of Idaho Railway, Light & Power Company,

Appellants,

v/s.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B.
CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES,
EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD,
Personally and as a Bondholders' Committee, W. J. FERRIS, as Receiver
of Idaho-Oregon Light & Power Company, UNITED STATES OF
AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELEC-
TRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFACT-
URING COMPANY, A. H. SUNDLES and AMERICAN STEEL &
WIRE COMPANY,

Appellees;

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES,
EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD,
JOHN R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L.
PARMELEE and CHARLES M. SMITH, Intervenor, and being a Protec-
tive Committee for the Holders of the First and Refunding Bonds of the
Idaho-Oregon Light & Power Company,

Cross-Appellants,

v/s.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS,
Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-
OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver,
BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES
OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL
ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANU-
FACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL &
WIRE COMPANY,

Cross-Appellees.

Brief of Eldon Bisbee as *Amicus Curiae* in Support of Appellants.

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

Filed

NOTE—As the writer of this brief has taken no part in arranging the assignments or specifications of error, and as he assumes that his brief will be considered by the Court, as supplemental to that of the solicitor of record for the appellants, he has not included therein Specifications of Error, nor has he made his points referable to any particular Assignments of Error, having assumed that the Court accepts his brief as an addition to the general discussion rather than one intended to be controlled by the requirements of the Rules with respect to the contents and arrangement of briefs of counsel. Obviously, however, all of the Points are covered by Assignments of Error.

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PANY ET AL,
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VS.

STATE BANK OF CHICAGO ET AL.,
Respondents.

BRIEF IN SUPPORT OF THE APPELLANTS.

SUBMITTED BY ELDON BISBEE AS AMICUS CURIAE.

All of the italics in the brief are mine.)

The author of this brief represents those who have supplied approximately \$6,500,000 to finance the investment represented by the securities of the Idaho Railway, Light & Power Company (hereinafter called the Railway Company), including the interests of that Company in the Idaho-Oregon Light & Power Company. He did not, however, represent them at the time of the transactions of which complaint is made and seeks, therefore, to approach with unbiased judgment the consideration of the questions involved on this appeal. His desire is to discuss those questions in their broadest and most fundamental aspects, and without regard to any technical considerations.

Succinctly stated, the effect of the decree below is that holders of corporate bonds, secured by a particular mortgage, may, after the insolvency of the mortgagor and because of the

then determined insufficiency of the security, repudiate contracts between the mortgagor and a third person, made and executed respectively fifteen months and approximately one year prior to the appointment of a Receiver for the mortgagor, no complaint with respect to which has been made by the mortgagor or by its stockholders. The result is sought to be justified because as a result of the transactions, additional bonds, *thereby became outstanding, which, though* certified and issued in exact compliance with the terms of the mortgage, increased the aggregate of the bonds outstanding and, therefore, decreased the proportionate security of those previously issued. This result was reached, notwithstanding the fact that it is conceded that the very large additions to the value of the security held for the benefit of the First Mortgage Bondholders, which, under the terms of the mortgage, entitled the mortgagor to issue the additional bonds, represented the proceeds of the sale of Second Mortgage Bonds and, to some extent, the investment of surplus earnings. In the Court below, the intervenors cited no case sustaining the propositions for which they contend, but rested their claims upon what they termed a broad appeal to the conscience of a Court of Equity.

So far as we were able to judge, in the last analysis, they found their superior equities in the assertion of the fact that, despite the full performance of their contract with the mortgagor, the bondholders represented by them are entitled to greater consideration from the mortgagor than their contract required and their investment has a higher claim upon a Court of conscience than that of others.

The brief for the intervenors in the Court below contained assertions of fact, cunningly designed to influence the Court against those whose interests are ultimately affected by the decision, regardless of the circumstance that the record contained no evidence of such facts, contained unfounded assertions with respect to evidence in the record and, so far as legal authority is concerned, presented it in the form of extracts from the utterances of courts, general in their nature, and sufficiently apt in themselves, but wholly foreign to the facts in the present case. The result is that the Court has based its ultimate conclusion upon assumptions which we believe to be entirely unsupported by the evidence. These will be discussed in subsequent portions of the brief and the

subject is mentioned now only for the purpose of placing this Court on its guard against the acceptance of the assertion of facts unless verified from the record.

As many of the propositions are considered in the brief for the Receiver of the Railway Company and as our discussion is designed only to cover points deemed fundamental, we believe that we can best aid this Court by following in a general way the opinion of the learned Judge of the District Court and pointing out wherein we consider that he has fallen into error, both with respect to the law and the facts.

I.

The Nature of the Issue.

As indicated in his opinion (Record, pp. 133, 134), in reaching his conclusions, the Trial Judge ignored the manner in which the issues were actually raised and upon the assumption that it would be to the interest of all parties to have the questions determined in advance of the foreclosure sale, considered the issues as though they had been presented by the Railway Company in connection with proof of ownership of its bonds for the purpose of sharing in the distribution of the proceeds of the sale. Although, prior to the rendering of the decision, the appellants appear to have taken no position which justified the assumption that they desired the issues to be determined other than as made upon the pleadings, in deference to the desire of the Court to dispose of the question in substance and regardless of the form of the controversy, in connection with the entry of the decree, they stipulated that they would not object to the decree upon the ground that it was made in anticipation of distribution. It is most earnestly submitted, however, that such stipulation should not be made the basis of shifting any burden of proof assumed by the intervenors in adopting their present method of procedure nor of any inferences against the appellants because of their failure to present facts which, had they assumed the affirma-

tive, they might properly have been required to present. In other words, it is clear from the stipulation as recited in the decree that its intent was to eliminate from this controversy the technical contention that the issues herein determined were prematurely tendered by the intervenors and that it was not intended thereby to deprive the Railway Company of its right to present upon distribution any facts which may be material to the conclusion reached by the Court and which are not found in this record. Any other construction of the stipulation would be subversive of the rights of the Railway Company because, upon the trial, the issues made by the Bill in Intervention and the answers of the Power Company and the Railway Company to so much thereof as the Court required them to answer, did not present the question of the rights of the Railway Company upon distribution and, accordingly, except to the extent of objecting to the decree herein upon the ground that the proceeding was prematurely brought, the rights of the Railway Company upon distribution should not be curtailed.

II.

The assumed insolvency of the Idaho-Oregon Light & Power Company was not a fact.

In this connection, we have observed that at certain points of his discussion, counsel for the Receiver of the Railway Company, argumentatively, concedes the inability of the Power Company to continue its business under the conditions obtaining during the Fall of 1912; and that, in the same way, at one part of his brief, assumes its then insolvency. As the issue of insolvency was not presented by the pleadings and was not litigated at the trial, we understand that such statements are not intended as concessions of the fact of insolvency nor of the fact that those then in control of the Company's affairs had any intention of discontinuing its business. In

any event, however, we most earnestly submit that such statements should not be accepted to the prejudice of the real parties in interest; and that, in considering the case, this Court should be guided solely by the pleadings and the evidence, regardless of the interpretation thereof by counsel either for the Railway Company's Receiver or for the Interveners.

As we read the opinion of the learned Trial Judge, his conclusions are predi~~ct~~^{ed} solely upon the theory that the mortgagor Company was insolvent in September, 1912, when occurred the first of the transactions of which the intervenors complain. It follows, therefore, that if it be shown that the record contains no evidence justifying such an assumption, the entire foundation for the conclusions of the lower Court fails and the structure erected thereon must fall to the ground.

As indicative of the Court's conclusions in that regard, we call attention to the statement in the opinion (Record, p. 133) that "The Power Company has also answered, but in view of *its insolvency* and its subserviency to the Railway Company, its position in the controversy is without importance;" to the statement (p. 137) that in September, 1912, "It is clear that they (those alleged to have been representing the Railway Company) had reached the conclusion that the Power Company was hopelessly insolvent, as was undoubtedly the case, etc."; to the suggestion (p. 140), that the Railway Company interests then considered that the Power Company's First Mortgage Bonds "were worth less than their face" and, therefore, that the Consolidated ^{or} ~~and~~ Second Mortgage Bonds were "wholly valueless"; to the statement (p. 140) that "There is but one rational explanation of the agreement, and that is that the interests having control of the Railway Company, and through it of the Power Company, having concluded that the latter was hopelessly insolvent, and that a reorganization was inevitable and a receivership probable, resorted to this expedient for saving to themselves as much of the wreckage as possible," and to the observation (p. 145) that, while it may be conceded that a creditor of a solvent corporation, whether secured or unsecured, has no legal right to complain of the improvident disposition of its property, "it must not be forgotten that here the corporation was insolvent, and those whose duties as

Trustees it was fairly and honestly to administer its affairs undertook to prefer themselves."

It will be observed that, in connection with none of the statements just quoted, has the Court referred to a *single fact* upon which to predicate his conclusion of insolvency in September, 1912.

There is no evidence in the case that the Railway Company or any one associated with it ever sold or sought to sell one dollar of the securities ^{purchased from} of the Power Company or ^{from} of the Railway Company. Evidence introduced by the Intervenor, however, discloses (p. 335) that at the end of January, 1912, a few of the First Mortgage bonds sold at par, in April a few sold above par; that (pp. 340 & 344) *in September, 1912*, said bonds sold in the market at par; that as late as December, 1912, they sold at par, and that in July, 1912, *Messrs. Kissel, Kinnicutt & Company, who were the Managers of the New York Syndicate against which the Court's strictures are particularly directed, purchased \$10,000 of the bonds in the market at 95½. (p 344)*

The tables shown on pages 333-340 and on pages 343 & 344 indicate the general market prices of the bonds since 1910. Surely, the circumstance that those tables disclose sales as low as 80 cannot be the basis for the Court's conclusion that if the First Mortgage Bonds were worth less than their face value the Second Mortgage bonds were wholly without value, nor does it seem possible that the Court can have concluded that, because the market value of the First Mortgage bonds was less than par, the Company was necessarily insolvent. We say this, because, under such a rule, the majority of going concerns whose bonds are customarily quoted on the exchanges are insolvent. Yet, unless the conclusion of insolvency was based upon the evidence mentioned, we are unable to discover any justification therefor.

The state of the record is such that the conclusion must be inevitable that the cause was not tried upon either side upon the theory that in September or December, 1912, the Power Company was insolvent but rather, so far as the Intervenor was concerned, upon the theory that, in arranging the exchange of the First for the Second Mortgage bonds, the Railway Company committed a fraud upon the holders of the

First Mortgage bonds which were outstanding prior to September, 1912, the purpose of which was to acquire a security having a demonstrated market value, varying, as shown by the tables last mentioned, during the year 1912, from 95 to par, for a security of less value, and, on the part of the Railway Company, upon the theory that, ~~since the Power Company was, at the time, a going concern which the parties in interest had every intention of maintaining as such,~~ as the holders of the First Mortgage bonds had, when the additional bonds were issued, obtained all of the additional security required by their contract, no cause for complaint then existed on their part, and that the transaction must be determined with respect to conditions which existed at the time and not with respect to conditions which existed at the time of the trial. So obviously is this the case that, if this Court shall conclude that the issues here presented depend for their correct solution upon the intent of the Railway Company, in September and in December, 1912, to maintain the Power Company as a going concern, a monstrous wrong will have been done those interested in the Railway Company who participated in the challenged transactions, if they shall not be afforded further opportunity to meet that charge. As significant of their intentions in this regard, do any facts in the record suggest a reason why Messrs. Kissel, Kinnicut & Company should, in July, 1912, have been willing to pay 95½ in the market for the First Mortgage Bonds and, two months latter, be sponsors ^{for} of a transaction having in contemplation the confessed insolvency of the Power Company and its reorganization; and the record is absolutely devoid of evidence showing or tending to show any circumstances transpiring between July and September, 1912, which changed the attitude of Kissel, Kinnicut & Company from that which led them to pay 95½ for the First Mortgage Bonds to one which had determined that the business would not be further prosecuted.

Insolvency is usually defined as the inability to pay one's obligations as they mature in the usual course of business. It is not dependent upon the ability to sell one's assets at a particular date for sufficient to pay his then liabilities.

Indeed, as applied to corporations, for the purpose of de-

termining whether or not the Company is insolvent within the rule that, only in such event, are its creditors interested in the disposition which it makes of its property, as we shall subsequently show, though the managers of a corporation know that its assets are insufficient to meet its obligations, unless at the time of a given transaction, it has been determined that the Company's business cannot be continued, it is not insolvent, for the purpose of applying that rule.

Sanford Fork & Tool Co. v. Howe, Brown & Co.,
157 U. S., 312.

Clark & Marshall on Private Corporations, Sec.
787c.

Coler v. Allen, 114 Fed. (C. C. A., 9th Cir.), 609.

Damarin v. Huron Iron Co., 47 Ohio State, 581.

Chick v. Fuller, 114 Fed. (C. C. A., 7th Cir.), 22.

*Abrams v. Manhattan Consumers Brewing Com-
pany*, 142 N. Y. Appellate Division, 392.

Willmott v. London Celluloid Co., L. R., 34
Chancery Division, 147.

As some of the authorities above mentioned are, perhaps, more pertinent to the point as to the character of frauds which affect creditors, we reserve for that place their more detailed consideration. We will, however, in connection with other authorities to be noticed, discuss some of them under this point.

Of course, the question to be determined is not the insolvency of the Power Company at the time of the trial, but in September and December, 1912.

In determining the validity of a voluntary conveyance, the insolvency of the grantor at the time of the conveyance is the question to be answered; its subsequent insolvency is of no importance.

State v. Martin, 77 Conn., 142.

Masters v. Templeton, 92 Ind., 447.

Philips v. Potter, 32 Iowa, 589.

American National Bank v. Thornburrow, 109 Mo.
App., 639.

Martin v. Evans, 2 Rich. Eq. (S. C.), 368.

Bank v. Puget Sound Loan, etc., Co., 20 Wash., 636.

And the fact that one is insolvent when the bill is filed is no evidence of insolvency at the time of the transaction.

Windhaus v. Bootz, 92 Cal., 617.

Coghill v. Boring, 15 Cal., 213.

Seaman v. Bisbee, 163 Ill., 91 ; 45 N. E., 208.

Donahue v. Coleman, 49 Conn., 464, 466.

Nevers v. Hack, 138 Ind., 260 ; 37 N. E., 791.

Hathaway v. Brown, 18 Minn., 414.

It is our sincere belief that, in making the statement in his opinion concerning the insolvency of the Power Company, the learned Trial Judge was sub-consciously affected by the circumstance that both the Power Company and the Railway Company subsequently became insolvent ; that he had been called upon to appoint receivers thereof and that such receiverships were still pending in his Court. So strongly does he appear to have been affected by the conditions subsequently surrounding him that, although counsel for the Receiver was willing to concede, for the purpose of developing all of the questions possibly involved, that the property will not bring sufficient to pay all of the outstanding first mortgage bonds, without a scintilla of evidence in the record upon which to base the statement, he observes in his opinion that, "It is wholly improbable that the proceeds (of a sale of the Power Company's property) will be sufficient to pay in full the First Mortgage Bonds outstanding, *aside from those presently involved.*" Undoubtedly, he was influenced to make the observation because of the obvious fact that, unless and until a sale has demonstrated the insufficiency of the security to pay all of the outstanding First Mortgage Bonds, no possible damage can be suffered by the Intervenor ; for which reason also he desired to dispose of the issues as though the sale had been made and a deficiency had resulted.

As we have before mentioned, the issues were neither made nor tried by the Intervenor upon the theory that the Power Company was insolvent, but upon the theory of the Bill in Intervention, which was that, in September and December, 1912, the Power Company was a very valuable property, which was then the victim of an extravagant management ; and that, because those interested in the Railway

Company had, with the exception of the Power Company, ill-advisedly made their very large investment in the Companies and properties controlled or acquired by the Railway Company in September, 1912, they began the consummation of a conspiracy, which dated from September, 1911, when the Bankers first purchased an interest in the Power Company, to acquire the property of the Power Company for nothing, to which end they so manipulated the affairs of the Power Company that in April, 1913, they deliberately brought about a fictitious default with respect to its First Mortgage Bonds. That such is ^{the} a scheme of the Intervenor's Bill is abundantly shown by statements contained in Clauses VII., VIII., IX., X. (pp. 14-29), XI., XII., XIII., XIV., XV., XVI., XVII. (pp. 28-37), and XIX. (p. 39), to which we earnestly call the Court's attention.

Thus, the petition alleges (Clause VII., pp. 14-15) that the bankers had purchased \$6,500,000 of the Railway Company's bonds "with a view of re-selling the same to the public," but that "said bonds have not in fact been sold to the public" because "they have not been marketable for the reasons hereinafter set forth"; that being unable to market the bonds, the bankers pledged them with various financial institutions in New York City; that such bonds were not marketable because the earnings of the properties acquired by the Railway Company were insufficient to meet operating charges, adequate provision for depreciation and "interest upon the excessive and exorbitant prices paid for said properties and for which said \$6,500,000 of bonds were issued."

"The intervenors show that Kissel, Kinnicutt & Company (the Bankers) and their associated banks have now *been carrying this load* for nearly two years, and that it became clearly necessary to consummate the plan of acquiring the property of the Power Company in such a manner as to get additional security behind the said bonds of the Railway Company and especially to show added earning capacity in order to render the said Railway bonds marketable and avoid an enormous loss on the \$6,500,000 of such bonds; and the readily available course was to get rid of the First Mortgage Bonds of the Power Company by the easy device of a foreclosure, at which there would be and could be no bidder except the Railway Company, and thus seize the property and earnings of the Power Company"

(p. 17) ; that monies which are alleged to have been required by the original contract between the Power Company and the Bankers to be used for certain purposes were "diverted to other purposes to the great injury of the Power Company and its creditors ; and the Intervenor charge that this was done in pursuance of a scheme of the Railway Company and Kissel, Kinnicutt & Company *to reduce and divert the income of the Power Company, break down its credit, cause it to default in its obligations and to purchase its property for a nominal amount, to the fraud and injury of the holders of the First Mortgage Bonds of the Power Company*" (p. 19) ; "the control and domination of the Railway Company over the Power Company is thus shown *to have been destructive of its business and income, an attack upon the security and bonds held by your Intervenor, and your Intervenor charge that this control and domination were exercised for the purpose of depreciating such security and enabling the Railway Company to carry out the scheme of purchasing the Power Company's property on the proposed reorganization, which is shown in the plan attached to the Bill of Complaint herein and of which the default in interest alleged in the Bill and this suit to foreclose are a part*" (pp. 19, 20), "that the Intervenor charge that *the obtaining of the control of the Power Company by the Railway Company was the beginning of a plan then formed for the absorption of the business and properties of the Power Company without just and true compensation therefor, of which the management of the Power Company by the Railway Company, the alleged defaults in the payment of interest on the Power Company's bonds in April, 1913, the plan of reorganization prepared and put out in advance of said default, the foreclosure herein instituted, are all a part, etc.*" (p. 36), that, "although the Power Company *refused payment upon the interest coupon on the First Mortgage Bonds which was due April 1, 1913, and thereby occasioned default thereon, such failure and refusal was due to the domination and control of the Railway Company and was part of the scheme for the acquisition of the property of the Power Company by the Railway Company through this foreclosure ; and that, immediately thereafter and before the declaration of default by the Trustee, said interest was in fact paid to the bondholders who are said to seek this foreclosure, and paid in part by the Trustee which is a complainant herein* * * * and that, therefore,

although a formal and technical default was created, no actual default now exists as to any of the bonds deposited with the New York Committee, etc. etc."

Such quotations from the Bill might be multiplied indefinitely.

After the hearing upon the petition for leave to file the same the Power Company and the Railway Company were required to answer only with respect to the portions of the Bill referring to the 718 bonds, the 107 bonds and the allegations with respect to the actual payment of interest to certain of the First Mortgage Bondholders. The order also provided that, "the failure of any party to answer any averments in said Bill in Intervention not expressly required by this order to be answered shall not be construed as an implied admission that the same are true" (pp. 56 and 57). In accordance with the order the answers filed were limited to the matters particularly set forth therein. That circumstance did not, however, to any extent, restrict the activities of counsel for the Intervenor, as is, to some extent, shown by the testimony offered and excluded (pp. 454-477). That the Intervenor did not assert nor seek to prove that the Power Company was insolvent in September and December, 1912, is evident in many ways. Thus (pp. 203-204), monthly reports of operations of the Railway Company were offered, as stated by counsel, "for the purpose of showing the *condition of the Railway Company* in 1912, as establishing a motive, or tending to establish a motive, for the transaction which is in issue here, etc.," and which was admitted over the objection of the respondents, the Court expressing its conclusion in the following language: "This is somewhat remote, but I think perhaps I shall let it go in. It may have some bearing upon the good faith and reasonableness of the transaction. The objection will be overruled." The Exhibit will be found at pages 205-206. Its receipt in evidence was followed by the offer by Intervenor's counsel and the receipt, over the objection of respondents' counsel, of testimony to the effect that, on December 31, 1912, which was the month covered by the statement of operations, the "capital charges outstanding against the Railway Company were \$7,361,000. Most of it at 5%" (p. 207). Then by the balance sheet of the Railway Company as of December 31, 1912

A.

The intervenors presented much evidence to show that, had the directors so desired they might have sold the First Mortgage Bonds at advantageous prices, which effort is wholly inconsistent with the assumption by the Learned Trial Judge that the Company was then "utterly insolvent". Thus, (p.319) in response to inquiries from intervenors ~~attorney~~ counsel, Mr. William Mainland stated that, in his opinion, in the Fall of 1912 the first mortgage five percent bonds then subject to certification could have been sold at a fair price to produce the funds needed by the Company. Mr. Sinclair Mainland made a similar statement (p.321), saying that he urged that such action be taken but that "from his conversation with Mr. Fuller he was of the opinion that the latter did not want to do it". Intervenor's counsel asked Mr. Reynolds, one of his bond selling witnesses, the same question; and he replied that, from the condition of the company as it appeared from its statements, reports and information, he could have marketed the five percent bonds on the same basis as the six percent, which would be about 52 (p.341). On Page 343, this witness again made a similar statement. Mr. Parmelee, another bond selling witness stated that "considering what was publicly known of the affairs of the Power Company in the latter half of 1912", he thought that the five percent bonds could then have been sold at a fair price (p.345); and that he then thought they were worth par (p.346).

Whatever may have been the intent of counsel in introducing the Exhibits above mentioned and others which accompanied them, it is most earnestly contended that the consideration of certain items appearing thereon demonstrate beyond peradventure that those in control of the Power Company in September and December, 1912, had no expectation that its business was to be discontinued.

The statement of earnings of the Power Company for September, Intervenor's Exhibit 25 (p. 213) shows (last line) that during that month \$69,637.55 *had been expended, for construction alone*, while intervenor's Exhibit 29 (p. 216) shows that, during September of that year the Property, Plant and Equipment *had increased* (second line of the Exhibit) *to the extent of \$79,637.55.*

Intervenor's Exhibit 30 (pp. 220, 221), shows (last line) total construction for 1912.....	\$385,359.12
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The corresponding statement for the nine months ending September 30th (Exhibit 28, p. 213) was	267,463.71
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Accordingly, during the three months ending December 31, 1912, total expenditures for construction alone aggregated.....	\$117,895.41
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These Exhibits also show that, *during December, 1912, the Company expended for construction no less than \$79,923.55.*

Turning to the general balance sheet as of December 31, 1912 (Exhibit 33, pp. 225-229), we find :

Total additions to Property, Plant and Equipment during 1912.....	\$680,539.70
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By comparison with Exhibit 31 (p. 222) we find that at September 30, 1912, the total of such additions was.....	470,359.12
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Showing that during the three months ending December 31, 1912, additions to Property, Plant and Equipment were made to the extent of.....	\$210,180.58
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It will be observed that the sum last mentioned is greater than the estimate of the general manager for the four months ending December 31, 1912 (pp. 426-429).

Having due regard for these figures, introduced, as will be recalled, by the Intervenor, is it possible to conclude that

intelligent business men would, in addition to making up the deficit in current earnings, have expended these large sums in extending the Plant and Equipment of this Company had they anticipated that it would shortly cease to be a going concern? Could there be more persuasive evidence of the intentions of the parties in September, 1912, when occurred the first of the transactions which the Trial Court has condemned on the ground that the Power Company was then insolvent? Do men of affairs add to an already large investment in an enterprise at the rate of \$70,000 per month, *after* they have concluded that it is an utter failure and that it cannot be made a success? Surely it is sufficiently serious to have considered the Railway directors scoundrels, whereas, if the Court is correct as to their intentions, they must also be branded as fools.

The record contains no evidence with respect to the additions to the plant and property after December 31, 1912. It is most confidently contended, however, that, if a determining factor here is the question as to whether or not, in September, 1912, the Directors of the Power Company had concluded that its business could not be continued and had concluded that it would shortly cease, for which reason, as the lower Court considers, they were ~~not~~ actuated by the motive of saving as much of the wreckage as possible, the officers and directors of the Railway Company should be afforded full opportunity to spread upon the record their acts from the first date in question, until the appointment of the Receiver in December, 1913. We conceive it to be improper to make assertions with respect to facts which are not in the record. We feel, however, that it is abundantly fit and proper that we should appeal as strongly as possible to the conscience of the Court in order that the transactions of individuals, heretofore bearing honorable personal and business reputations, may not be finally condemned as fraudulent, because of their knowledge of the insolvency of this corporation, when they were not, either by the Intervenor's pleadings or by any suggestion during the conduct of the trial, called upon to defend themselves against such a charge.

In addition to the foregoing, as bearing upon this point, we call attention to the fact (pp. 402-404) that, at the end of November, 1912, the Power Company entered into a contract

with Bates & Rogers Construction Company,* calling for the payment by the Power Company of \$40,000 in cash, in order that it be released from a burdensome contract and that, in the same contract, they agree to pay in cash (p. 403) other sums for a portion of the plant of the Bates & Rogers Company, depending on an appraisal, and took an option on another portion of their plant at a price of \$12,000.

Would this settlement have been made and consummated at that time, if these people had been intent upon wrecking the Power Company; or had they the slightest notion that a Receiver of its properties was likely to be appointed? Had any such expectation been present, would they have paid out large sums of money in cash for the purpose of being rid of a contract, which, as the testimony abundantly shows, they desired to terminate, because their engineer had advised them that continued construction thereunder would increase the cost of the work to the extent of \$100,000? If any notion of Receivership had then been in their minds, a much more economical method of disposing of the contract would have presented itself.

In addition to the foregoing considerations, the Court will notice that a part of the complaint of the intervenors was with respect to the certification and disposition by the Power Company of 107 of the First Mortgage Bonds, in addition to the 718, which bonds were certified after April 1, 1913, and that even at that late date, and after default in the payment of interest on the First Mortgage Bonds, the Railway Company loaned money to the Power Company upon the security of the 107 bonds (pp. 109 & 134).



Taking the assets and liabilities of the Power Company, as disclosed in the balance sheet of September 30, 1912, which is the only direct evidence before the court as to the character of the items which may properly be considered upon the credit and debit sides of its account, we find that the total assets are listed at \$15,537,000, while, eliminating the \$10,000,000 of capital stock, we find the liabilities listed at \$5,537,000, thus showing a surplus of more than \$5,000,000 (Ex.

31, pp. 222-224). The same aggregates as shown on the balance sheet as of December 31, 1912 (Ex. 33, pp. 227-229) give a surplus of \$5,885,000. On the basis of these figures, therefore, at the end of each of the months in question, the value of the company's assets exceeded that of its liabilities.

The only evidence to offset the valuations thus shown is the concession (p. 381), made at the trial by counsel for the respondents that, for the purpose of this case, the respondents were content to have the court assume that the value of the company's properties were then (*in June, 1914*) less than the aggregate of the first mortgage bonds, which aggregate, as shown by the record, is, including the 107 bonds, \$3,319,000. Assuming the accuracy of the concession which, in view of the existing foreclosure decree, was undoubtedly made with the idea of values such as would likely be established upon a forced sale under financial and commercial conditions then existing, can it be reasonably and convincingly argued that the valuations shown in the balance sheet were necessarily erroneous? During the interval, it is a matter of common knowledge, that corporate properties which, prior to the recent severe business depression, were believed to possess very great value, have realized at forced sale prices representing but a small proportion of the values which they had justifiably been considered to possess under more promising conditions.

We have reserved for another place the discussion of the general proposition as to what corporate transactions creditors are entitled to assail, and the conditions under which their claims may be asserted. We assume, however, that everyone will agree that, unless, at the time of the transactions complained of, the corporation be insolvent, the interests of creditors are not affected; and the point which we particularly wish to make here is that the character of insolvency contemplated by this rule is not necessarily measured by a surplus in selling value of assets over liabilities, nor necessarily by the ability of the corporation to meet its obligations as they mature in the usual course of business, but by the consideration as to whether or not, at the time of the transactions under investigation, ^{it} is still prosecuting its business in good faith with a reasonable prospect and expectancy of continuing so to do.

The rule is stated in Clarke & Marshall on Private Corporations, section 787c, and is expressed in the following language :

“ By the weight of authority, a corporation is not insolvent, *within the meaning of the rule prohibiting preferences by insolvent corporations to their officers*, merely because it is embarrassed and cannot pay its debts as they become due, or even because its assets, if sold, would not bring enough to pay all its liabilities, *if it is still prosecuting its business in good faith with a reasonable prospect and expectation of continuing to do so.*”

Tested by this rule, we most confidently assert that the record here under review not only contains not a scintilla of evidence suggesting that, in September, 1912, and in December, 1912, those responsible for the conduct of the affairs of the Power Company did not expect that its business would continue, and, in good faith, did not consider that the reasonable prospect justified such a conclusion.

In *Corey v. Wadsworth*, 99 Ala., 68, the court held that to render a corporation insolvent,—

“ it is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business, with a prospect and expectation of continuing to do so. In other words, if it be, in good faith, what is sometimes called a *going* business or establishment. Many successful corporate enterprises, it is believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all of their liabilities in full.”

In *Walkenshaw v. Perzel*, 4 Robertson (27 N. Y. Super.), 426, the court remarked that,—

“ it is true that ‘*insolvency*’ and ‘*inability to pay*’ are synonymous, but insolvency does not mean inability to pay at all times, under all conditions, and everywhere on demand, nor does it require that a person should

have in his possession the amount of money necessary to pay all claims against him. *Difficulty in paying particular demands is not insolvency.*"

In *Queen v. Saddlers Co.*, 10 H. of L. Cas., 404, it appeared that a by-law of a chartered company provided,—

"that no person who has become a bankrupt, or otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this company."

The relator was elected a member of the court, but at the time was not possessed of sufficient assets to meet all of his liabilities, although he then continued in business without default. Shortly thereafter, however, he was declared a bankrupt. *Held*, that within the meaning of the by-law, he would not be regarded as insolvent at the time of his election.

In the opinion in *French v. Andrews*, 81 Hun (New York), 272 (affd., 145 N. Y., 441), in considering a statute prohibiting the transfer of assets by insolvent corporations, the court thus stated its conclusions :

"Insolvency has been differently defined in different courts. By some it is said to be a condition in which the value of the assets is less than the amount of liabilities. By others it is said to be a general inability to pay obligations as they become due in the regular course of business. Many a business is at times insolvent according to the first of these uses of the word, although it is prosperous, and no one thinks for a moment that any necessity will arise for applying its property to the payment of its liabilities by process of law. There is no necessity for the law to interfere in behalf of the creditors so long as the corporation is able to meet its obligations promptly. The use of the word, in the statute under consideration, is the latter use."

In *Toof v. Martin*, 13 Wall., 40, speaking through Mr. Justice FIELD, concerning insolvency under the former Bankruptcy

Act, which did not define it, the Supreme Court of the United States said :

“ The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business. *It is in this latter sense* that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of congress.”

In this connection it is interesting to observe that the case which appeared to the learned Trial Court to contain language “ most pertinent,” and from which he quoted extensively in support of his conclusions, is *Howe, Brown & Co. v. Sanford Fork & Tool Co.*, 44 Fed., 231 (Record, pp. 147, 148). This case was reviewed by the Supreme Court of the United States in 157 U. S., 312, and the judgment below was *unanimously reversed*. In the light of the conclusions reached by the higher court, as the learned judge below stated, the case is “ most pertinent ” to this phase of the present controversy, for which reason we will consider it at some length.

There, the plaintiffs were creditors of the defendant Company, whose claims accrued prior to March 17, 1890, at which time the mortgage complained of was executed. The individual defendants included all of the directors of the Company. Between September 18, 1889 and March 3, 1890, such directors endorsed notes for the defendant Company aggregating \$74,000.

“ At the time these directors and stockholders endorsed these notes, the Tool Company was a going concern, in full operation, etc. * * * They believed that such property was worth what it had cost in cash, that the corporation was ‘ solvent and capable of becoming an independent and profitable manufacturing institution as soon as it could win its way to a favorable market for its manufactured products.’ ”

As the notes began to mature, it was found that the Com-

pany could not pay them and required a renewal or an extension. Thereupon, on March 1, 1890, at a meeting of stockholders, at which 2250, out of a total of 3,000 shares, were represented, the directors were authorized to execute a mortgage upon all of the Company's property to secure any new indebtedness that might be incurred, "or the renewal and extension of any present indebtedness or liability of the corporation." Thereupon the mortgage in controversy was executed, conveying the Company's manufacturing plant to a trustee to indemnify the six endorsers of its said notes, five of whom constituted its board of directors. The mortgage was not recorded until May 1, 1890. When it was executed, the Company was in full operation as a "going concern," and, in fact, the corporation continued to be "a going concern" and carried on its business in the usual way, and met all its obligations (other than the notes embraced in the indemnity mortgage) as they matured in the usual course of business, until the appointment of a Receiver on May 13, 1890. The directors accepted the mortgage in good faith, with knowledge that all of the money obtained from the notes which they had endorsed had been properly appropriated to and gone into the property and material of the Company.

At the time of the execution of the mortgage, the Tool Company was indebted in the sum of \$275,000; the value of its property at that time does not appear, but after the appointment of a Receiver it was appraised, the manufacturing plant (the property described in the mortgage) at \$116,000; its other and unincumbered property at \$88,000.

As the stockholders meeting, which authorized the mortgage, was held on March 15, 1890, although the date of the mortgage is not given, it must have been executed on or after that date. As the Receiver was appointed May 13, 1890, it will be observed that the Company confessed insolvency within less than two months after the giving of the mortgage.

Mr. Justice BREWER, in delivering the opinion of the Court, among other things, said :

"The corporation was still a going concern. There was no purpose of abandoning the business. The indorsers believed that if the corporation could be tided over its temporary embarrassment it could be made suc-

cessful. * * * Thus they (the directors) prevented a suspension of the business and enabled the corporation to continue its operations, and did so believing that by such continuance the corporation would be able to work itself out of its temporary difficulties. All this was done in the utmost good faith.

“ Under these circumstances, should the transaction be condemned and the mortgage held void as against creditors? This question, we think, must be answered in the negative.”

The learned Judge then considered the relationship of the stockholders and of the corporation to the matter, and observed :

“ It was an application by the debtor of its property to secure certain of its creditors and not the act of the agents of a debtor to protect themselves. The case involves no breach of trust on the part of the agent towards the principal, but more closely resembles the case of an individual debtor giving preferences to certain of his friends, and the general rule is that, in the absence of statute, a debtor has such *jus disponendi* in respect to his property that, although insolvent and contemplating a cessation of business and the surrender of his property to his creditors, he may lawfully prefer certain of them, even though thereby others receive no payment.

“ But, passing from the relations of directors to the corporation and its stockholders, it is one of the vexed questions of the law as to how far the duty of a corporation and its directors to creditors interferes with the otherwise conceded powers of a debtor to prefer certain of his creditors.”

After stating that, because of the circumstances of the case, it was unnecessary to go into a discussion of that question in all of its phases, and after pointing out that the case was not similar to others cited where the “ directors of a corporation, insolvent and intending to discontinue its business, gave a mortgage to secure certain of their number who hap-

pened to be creditors, and thus intended to secure a preference in behalf of themselves," proceeded :

" * * * here the corporation was a going concern and intending to continue in business, and the mortgage was given with a view of enabling it to so continue, and to prevent creditors whose debts were maturing from invoking the aid of the courts to put a stop thereto. Can it be that, if at any given time in the history of a corporation engaged in business, the market value of its property is in fact less than the amount of its indebtedness, the directors, no matter what they believe as to such value, or what their expectations as to the success of the business, act at their own peril in taking to themselves indemnity for the further use of their credit in behalf of the corporation? Is it a duty resting upon them to immediately stop business and close up the affairs of the corporation? Surely, a doctrine like that would stand in the way of the development of almost any new enterprise. It is a familiar fact that in the early days of any manufacturing establishment, and before its business has become fully developed, the value of the plant is less than the amount of money which it has cost, and if the directors cannot indemnify themselves for the continued use of their personal credit for the benefit of the corporation, many such enterprises must stop in their very beginning."

The Court also points out as a significant circumstance that the Company continued business for two months after the mortgage was given, during which time it paid out in the usual course of its business and in the discharge of obligations, more than \$30,000, "without appropriating a single dollar to the payment of the claims for the endorsement of which they had taken this indemnity." Thereupon, the opinion closes, as follows :

" We are of opinion * * * that it is going too far to hold that a corporation may not give a mortgage

to its directors who have loaned their credit to it, to induce a continuance of the loan of that credit, and obtain renewals of maturing paper at a time when the corporation, though not in fact possessed of assets equal to its indebtedness, is a going concern, and is intending and expecting to continue in business."

We have referred to the foregoing case at length, both because the learned Trial Judge largely rested his conclusions upon the case as reported below and upon *Lippincott v. Shaw Carriage Co.*, 25 Fed., 577, which was similar to the *Howe, Brown & Co.* case, and was decided by the same Judge, and because it indicates clearly the line of distinction between the cases which are condemned as being in fraud of creditors, because of insolvency of the corporate debtor, and those which are not subject to condemnation.

Although, in the case at bar, because the issue was not presented by the bill, the Railway Company interests have not been afforded an opportunity to show affirmatively that they did not consider the Power Company insolvent in September or December, 1912, in the sense that they knew that its business could not be continued and understood that it would not be; nor that, in advancing ~~it~~ additional funds and lending its credit, it was with the hope and expectation that its then financial difficulties would be overcome, we most confidently assert, ~~however~~, that, upon the record as it stands, the Court can find no justification whatsoever for its conclusion that the Company was considered by its directors to be insolvent, within the rule stated, and that they had concluded or expected that its business would shortly be discontinued.

In view of the evidence to which we have called the court's attention, and particularly in view of the lack of evidence justifying a finding of insolvency in September and in December, 1912, with great respect for the learned trial judge, we most earnestly revert to our previous explanation of his unwarranted and uncalled for conclusion "that the Power Company was insolvent and known and considered so to be by its directors" in September, 1912, namely, that sub-consciously he was affected by the conditions which had obtained since his appointment in December, 1912, of receivers for both the

Power Company and the Railway Company, and that, instead of addressing his mind solely to conditions shown by the record to have existed in September and in December, 1912, he found it impossible to rid himself of the conditions with which, for many months, he had then been struggling. The probable correctness of this conclusion is emphasized by the fact that, in reaching that conclusion, he departed entirely from the theory upon which the Intervenor's formulated and tried their case, and rested his decision upon a finding in respect to which the respondents were afforded no opportunity to present evidence.

Since his decision was based wholly upon the assumed affirmative fact of insolvency, we most earnestly submit that, if the assumption were unwarranted, his conclusions have failed to suggest any theory upon which the Intervenor's are entitled to relief and that, accordingly, his decree must be reversed and the Intervenor's bill be dismissed.

III.

The circumstances which justify creditors in assailing corporate acts.

It is interesting to observe that the industry of counsel for the Intervenor's was not rewarded by the discovery of a single case holding that bondholders, situated as are the intervenors, have ever been accorded the right to question the acts of their corporate debtor in disposing of its property, unless, by such acts, their contract has been breached. Accordingly, none of the cases cited by the learned trial court pretend to touch that point.

The general rule is that,

“ the legal relations between a creditor and a corporation are occasioned either by contract binding on the latter, or by a tort, for which it is responsible. Before the claims of a creditor arise, and during the transac-

tion itself on which his claims are based, the creditor is simply an outsider towards whom the corporation, or the corporate agent with whom the creditor contracts, *owes no duty not due to members of the public at large.* And creditors will rarely have any standing in court to object to acts of the corporation done before their claims arise."

Taylor on Corporations, 5th Ed., Sec. 651.
Graham v. R. R. Co., 102 U. S., 148.

In the case last cited it was alleged that lands were conveyed by the corporation to one N for an inadequate consideration; that N purchased with funds furnished by the directors, and soon afterwards conveyed to them personally. *Held* that, so long as it was not alleged nor shown that the corporation was insolvent, nor that the conveyance was made with intent to defraud creditors, as long as the company did not complain, creditors whose claims were not shown to have existed at the time, could not.

See, also :

Porter v. Pittsburgh Steel Co., 120 U. S., 649.
Continental Trust Co. v. Toledo R. R. Co., 82 Fed., 642, at p. 655.
Toledo R. R. Co. v. Continental Trust Co., 95 Fed., 497, at p. 528.
Central Trust Co. v. Columbus Ry. Co., 87 Fed., 815, at p. 828
Central Trust Co. v. Worcester Cycle Co., 110 Fed., 491.
Anderson v. Bullock, 122 Ala., 275.
Wells v. Northern Trust Co., 195 Ill., 288.
Beach v. Wakefield, 107 Iowa, 567.
Commercial Bank v. Warthen, 119 Ga., 990.

The authorities last cited abundantly sustain the proposition that, regardless of the character of his claim, unless a creditor was such at the time of the transactions of which complaint is made, there is no right under which he can contest them. This point is also clearly brought out in *McLean v. Eastman*, 21 Hun, at p. 315, where the court says :

"It is not alleged in the complaint, nor does the scope of the action permit an inquiry as to whether the

creditors represented by the assignee were creditors at the time of the transaction ; and, if not, *they have no interest in the money sought to be recovered.*"

To the same effect are :

Billings v. Robison, 94 N. Y., at p. 419.

Morawetz on Corps., 2nd Ed., Sec. 868, foot p. 841.

The court will search the record in vain for the purpose of determining when any of the Intervenor's acquired their bonds. The only evidence on the point is the allegation contained in the Bill in Intervention (clause III., p. 7), which alleges that at the time of the preparation thereof (September 16, 1913, p. 47) they held bonds of the aggregate face amount of \$432,000 ; and the stipulation contained in the record to the effect that, at the time of the trial, they held bonds of the aggregate face value of about \$2,000,000. Obviously, therefore, certain of their bonds were acquired between the date of the filing of their bill and the time of the trial of the action, but the record is silent as to when they, or those whom they represent, first acquired their bonds. Tested by this elementary and fundamental rule, therefore, the Intervenor's have not shown themselves to be in a position which, from any standpoint, justifies criticism on their part, or on the part of any of them, of the acts under review.

"A corporation cannot confer a right or claim against property which it does not own. Equitable claims of creditors can, therefore, attach only upon such assets as *belonged to the corporation* at the creation of the indebtedness or are acquired by the company thereafter. Hence, if a corporation should incur debts and become insolvent, after a portion of its capital stock has been withdrawn or *diverted from corporate uses*, creditors would not be entitled to follow the property or fund previously transferred, and hold it subject to their equitable lien, as in case of a distribution of assets made by a corporation while insolvent, and at the expense of existing creditors. Under these circumstances, creditors could not claim to have been wronged by

transfer of property made by the company while entirely solvent and before their claims arose."

Morawetz on Corps., 2nd Ed., Sec. 800.

Graham v. R. R. Co., 102 U. S., 148.

It thus appears clearly that unless in September and in December, 1912, the Power Company was insolvent within the rule established by the authorities heretofore cited, ~~we believe that we have abundantly shown that~~, under no possible circumstances, does the door of a court of equity open to the Intervenor in order that they may criticise the alleged wrongful acts.

The rights of corporate creditors as distinguished from the rights of the corporation and its stockholders to complain of transactions between the company and its directors was carefully considered in *O'Conner Mining Co. v. Coosa Furnace Co.*, 95 Ala., 614, where the principles involved are so clearly and ably expounded that we quote therefrom at some length :

" But the duty which disqualifies the directors from binding the corporation by a transaction in which they have an adverse interest, *is one owing to the corporation which they represent, and to the stockholders thereof*. A principal may consent to be bound by a contract made for him by an agent who, at the same time, represented an interest adverse to that of the principal. A *cestui que trust* may elect to confirm a transaction which he could have repudiated on the ground that the trustee had an interest in the matter not consistent with his trust relation. In like manner, *dealings between corporations, represented by the same persons as directors, may be accepted as binding by each corporation and the stockholders thereof*. The general rule is, that such dealings are not absolutely void, but are voidable at the election of the respective corporations or of the stockholders thereof. They become binding, *if acquiesced in by the corporations and their stockholders*. * * *

" The directors of the corporation, in the transaction of its business and the disposition of its property, do not stand in any such relation to the general credit-

ors of the corporation as they occupy to the corporation itself and to its stockholders. They are not the agents of such creditors, *nor can they usually be regarded as trustees acting in their behalf. The creditors are not entitled to disaffirm a transfer of the property of the corporation, made by its directors or other agents, merely because the corporation itself or its stockholders could have done so.* When a disposition of the property of a corporation is assailed by its creditors, *they are not clothed with the right of the corporation or of its stockholders to set aside the transaction, regardless of its fairness or unfairness, on the ground that it was entered into by representatives of the corporation who had put themselves in a relation antagonistic to the interests of their principal. The right of the creditor to impeach the transaction depends upon its fraudulent character.* The question in such case is, *was the transaction which is complained of entered into with the intent to hinder, delay or defraud creditors?* ”

It is impossible for us to perceive, and no authority or principle has been brought to our attention suggesting, any reason why bondholders or other secured creditors should be more favorably situated in this regard than the general creditors. Indeed, in considering abstract equities, it would appear that, so long as the provisions of their contracts are fully performed, because of the possession of security, courts should be less rather than more solicitous in their behalf.

In view of the rules of law last mentioned, it will be interesting to consider the cases, other than *Howe, Brown, Co. v. Sanford Fork & Tool Co.*, relied upon by the learned trial court as sustaining his views.

The first cited is *Jackson v. Ludeling*, 88 U. S., 616. The facts there were that certain minority bondholders, who were directors of the mortgagor company, had procured an order for the sale of its property, ~~which~~, without notice to the other bondholders or to the mortgage trustee, which they had purchased for \$50,000 and had, by what the court found to be “unwise and illegal conditions of sale” which “were exacted from other bidders but not from these purchasers” deprived the ^{bondholders} company of a bid of \$550,000 for the property.

The facts of the case were found by the court *to constitute deliberate fraud upon the majority bondholders and to have deprived them of the benefit of their contract.* Accordingly, the court granted relief at the instance of the majority bondholders and, in so doing, used the language quoted in the opinion of the trial judge.

The next case cited by the Trial Court is *Wabash Central & Pacific Ry Co. v. Ham*, 114 U. S., 587. That action was brought to assert in a broad aspect the proposition that the property of a corporation is a trust fund for the benefit of its creditors, which, as we shall subsequently show, is not a rule of property, but only one of convenience, developed by courts of equity in administering the estates of insolvent corporations. The observations of Mr. Justice STRONG, quoted by the learned trial Judge, are wholly general, and have no application to facts such as those under consideration here. Indeed, in that case, the court held that the trust fund theory did not entitle the plaintiff to relief.

The Court next quoted from *Lippincott v. Shaw Carriage Co.*, 25 Fed., 577. This case was decided by Mr. Justice WOODS, who subsequently decided the *Howe, Brown Co. v. Sanford Fork & Tool Co.* case, which, we have noticed, was reversed by the Supreme Court of the United States. The general observations of the learned judge in the *Lippincott* case were quite similar to those in the *Howe, Brown & Co.* case.

Whatever may be said of its reasoning, as applied to the facts there under review, it was found, as a fact, that the corporation, *while insolvent*, had transferred assets to its directors and managing agents under such conditions that they, as creditors, had thereby *acquired a preference* over the plaintiff, also a creditor at the time.

The court next cites *Sweeney v. Refining Co.*, 4 S. E. (West Va), 431. This also was an action by creditors, which was consolidated with one brought by mechanics' lienors, to set aside *conveyances of all of the property* of the defendant corporation to a trustee to secure debts due another corporation, which was a creditor and which had common directors with the Refining Company, whose votes were necessary for the authorization of the deeds. The court found that the defendant company *was wholly insolvent* at the time of the transac-

tion ; that it was known so to be by the directors ; that no present consideration was given for the deeds, that they constituted a *fraudulent preference*, and were intended to have that effect. In other words, they were made with intent to hinder, delay and defraud existing creditors, among whom were the plaintiffs.

Although the court does not quote therefrom, it also cited *Richardson v. Greene*, 133 U. S., 30, which was much exploited by intervenors in the court below as being practically upon all fours so far as the position of the plaintiff and the intervenors ^{here} are concerned. A careful reading of the case, however, disposes of any such possibility. The court's decision affects only, in one feature, 400, and in another 1105 of the bonds, which are mentioned in the opinion. These 400 bonds were *obtained without any consideration whatever*, and were taken by Richardson while treasurer and when the Company's other officers considered that they were only in his possession for safe keeping. Later Richardson obtained a judgment against the company for a small sum, upon which execution was issued. Thereupon he surrendered to the sheriff the 1105 bonds and numerous other bonds held by him as treasurer, had them sold under the execution, and himself became the purchaser, at a nominal price. As to the last transaction, the court held, first, that by delivering them to the sheriff and permitting them to be sold as the company's property Richardson waived any claim of lien upon the bonds ; and, second, as they had never been issued within the terms of the mortgage, they were not subject to attachment or to execution as valid obligations of the company.

This case is most instructive, and its consideration discloses that, despite the gross frauds practised by Richardson, the court protected him in the claim to the bonds delivered as security for the monies actually loaned.

IV.

(a) Fraud which entitles creditors to assail corporate acts.

(b) None such is here shown.

"Contracts between a director and his company are not nullities, but are merely voidable in equity *at the option of the corporation*. The contract is not void unless confirmed, *but is binding unless disaffirmed*. Hence, *such contracts cannot be avoided by anybody except the company*. * * * We have already seen that such contracts cannot be avoided by a minority shareholder. So, too, a sale of corporate property to the directors cannot be treated as a nullity, *or annulled by individual creditors of the corporation*. * * *

"The law governing the attempts by directors of a concern on the point of insolvency to secure a preference for their own claims against the company relates to the subject of winding up and dissolution, and is hardly pertinent here. Suffice it to say that preference of that sort may, on principle it would seem, be avoided by the receiver or liquidator without resort to any 'trust fund' theory or to any bankruptcy law invalidating the fraudulent preference, upon the simple principle that all dealings between the corporation and its directors are *voidable by the company or its receivers*. Indeed, it would seem that such preference may be set aside by individual creditors without resorting to any 'trust fund' theory or bankrupt act, upon the ground that such preferences *are fraudulent at common law or under the Statute of Elizabeth*."

Machen, Modern Law of Corporations, Sec. 1594.

The creditor "can assail the act (of a corporation) only on the ground that its intent or effect is to *fraudulently divert the credit or assets from his debt : he must charge fraud*."

Thompson on Corporations, Sec. 2850.

It is also to be observed that, in the absence of an intent to defraud a particular creditor and in the absence of statu-

tory restrictions, a corporation has the same right as an individual to prefer creditors.

Coats v. Donnell, 94 N. Y., 168.

The Statute of Elizabeth, mentioned by Machen, is the original statute in England, forbidding a debtor to transfer his assets with intent to hinder, delay or defraud his creditors. Its substance has been enacted in various forms in this country, and we assume that such statutes exist in the State of Maine, the domicile of origin of the Power Company, in Idaho, where the corporate business was transacted, and in New York, where the particular proceedings in question were had and the contracts made.

Although general and rather broad, perhaps a fair statement of the rule which entitles a creditor to act is the following :

“ Whenever a creditor has a vested right in or a lien upon the property, the enforcement of which is hindered or rendered inadequate by a fraudulent conveyance or encumbrance, he may maintain a suit in equity to remove it, without showing an execution or return of it unsatisfied, or without exhausting his other legal remedies.”

Schofield v. Ute Coal & Coke Co., 92 Fed., 269, at p. 271.

The case is very exceptional, however, which entitles to relief a creditor whose claim has not been reduced to judgment.

Scott v. Neely, 140 U. S., 108.

Maxwell v. McDaniels, 184 Fed., 311.

The latter case applies the rule last stated, notwithstanding the conceded insolvency of the debtor.

It would seem, therefore, that the strongest position which under the facts of this record, we can assume the Intervenor to occupy, is that they were creditors of the Power Company in September and December, 1912; that their claims are secured by the mortgage under foreclosure; that the Power Company is now insolvent and that, because their claims are conceded and, because, for the purpose of this proceeding, it

has been assumed that the properties of the Power Company will sell for less than the face amount of all of the First Mortgage Bonds outstanding, including those held by the Railway Company, their rights will be determined as though the sale had already been had, a deficiency had resulted, and they had become judgment creditors through the entry of a deficiency judgment; in other words, that they are judgment creditors.

Let us consider then, the character of the fraud which would entitle them to attack a transfer of the Company's property. For the purposes of this discussion, we assume the transactions to have resulted in a transfer of corporate property.

In his learned work on Fraudulent Conveyances, dealing with the Statute of Elizabeth and, by analogy, with similar statutes in this country, Mr. Bigelow (Knowlton's Revised Edition, 1911, p. 82), says :

“ When we come to conveyances *made for valuable consideration* a different question, *applicable alike to existing and future creditors*, arises. Such conveyances, if made in good faith, are expressly excepted from the operation of the statute. When is a conveyance not made in good faith? Is it necessary that it should be made *with actual intent to defraud*, to take it out of the exception? *So it appears to have been laid down.* ‘ There is one class of cases, no doubt,’ it has been said by way of concession, ‘ in which *an actual and express intention is necessary to be proved*, that is, where the instruments sought to be set aside were founded on valuable consideration.’ ”

In this connection, it is pertinent to observe that, as the author last quoted also points out, while a debtor continues to have dominion over his property, and in virtue of such dominion he “ may do many things, with the sanction of law, which may possibly or probably or even certainly delay or defeat his creditors. He may prefer his creditors; he may sell, mortgage, assign, or otherwise dispose of his property as though he were not a debtor.”

Bigelow, p. 448.

It is further pointed out that, "apart from special statute, the law does not deprive a debtor, even upon becoming insolvent, of his power to dispose of his property" (*Id.*, p. 450). Again: "To the simple, or at least lawful act of dominion *something wrongful* must be added to bring the case within the operation of the statutes; *there must be a trust* or a reservation out of the property for the debtor, or there must be an unlawful provision of some sort affecting the rights of creditors;—or, to come directly to the intent class of cases under the third aspect of intent, the transaction, if 'naturally' or legally 'innocent,' as by being on its face an ordinary exercise of dominion, must be a *subterfuge*" (*id.*, p. 450).

"Where harm follows from doing only what everyone may lawfully do, the case cannot, in any view, be treated as *intended wrong-doing*.

"In one particular this power of dominion, under the law allows a debtor to go a step further. He may not only prefer one creditor to another; *he may do so with the express personal intention of defeating the other creditor or creditors*, so far as the Statute of Elizabeth and the like American statutes are concerned. *Something further must be added* to make a case of intent to defraud within the meaning of those statutes" (*id.*, pp. 452 & 453).

In order that fraud of the character under consideration shall exist, it must be shown that the actors in the transaction had in mind, or to state the matter as favorably as possible to the Intervenor, should have had in mind the relationships of the Intervenor to the corporation; that they intended what was done to be in derogation of their rights and that the Railway Company should illicitly obtain an advantage. Thus, *the mere circumstance* that, as between the corporation and the actors, the consideration given by the corporation was grossly in excess of the value of what it received, *is of no importance*. *Stewart v. St. Louis F. S. & W. R. Co.*, 41 Fed., 736. The facts there were that two individuals had purchased a roadbed of a cost value of only \$2,000; that they caused a Railroad Company to be organized,

of which, with others, they became directors, and while in such relationship, contracted to sell said roadbed to the Company for \$200,000 in cash or bonds and \$3,600,000 capital stock. As bonds were not available, the Company issued its notes for \$200,000 in performance of the contract. The transaction had been approved by the directors and by the stockholders. Suit was brought to recover on \$85,000 of the notes, and the Company sought to defend on the ground that, because of the fiduciary relationship between those who transferred the \$2,000 roadbed and the corporation, the transaction should be condemned and payment of the notes excused. Discussing this matter the Court says :

“ The question still remains, were they guilty of fraud, deception, or any other breach of good faith in their fiduciary relations as directors ? * * * When the sale to the company was made they did hold a position of trust, and were bound in their official action to faithfully and honestly execute their duties and not to make a deal where their personal interest should be served at the expense of the Company they represented (citing). But it does not follow that the directors are prohibited, under all circumstances, from dealing with a member or members of the board as individuals. But there must have been a fair and open deal. It must have been free from fraud or collusion and characterized by entire good faith (citing). It does not appear in this case that there was any deception or fraud practiced by the parties. The property was open to inspection, and the approximate cost of constructing it was easily obtainable. Its value to the company for the purpose desired was not difficult to ascertain. * * * Now, who was defrauded or deceived ? All parties—directors and stockholders—assented to it ; and, surely, subsequent purchasers of stock, or the corporation itself cannot now object to it.”

Applying the language of the foregoing opinion, who was defrauded in the case at bar ? Intervenors show that the

Railway Company held at least eighty per cent. of the stock of the Power Company and the Company does not complain.

One of the cases mentioned in the opinion of the Trial Judge (Wabash, etc., Ry. v. Ham) was, apparently, cited to the proposition that corporate property constitutes a trust fund for creditors. Accordingly, we append controlling authority that, whatever else may be its scope, such doctrine is inapplicable, except in cases of confessed insolvency.

In *Hollins v. Brierfield Coal & Iron Company*, 150 U. S., 371, it is held that

“Neither the insolvency of a corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together give a simple contract creditor of the corporation any lien on its property, or charge any direct trust thereon.”

Again :

“*When a corporation becomes insolvent, the equitable interest of the stockholders in the property, and their conditional liability to creditors, places the property in a condition of trust, first for creditors, and then for stockholders ; but this is rather a trust in the administration of the assets after possession by a Court of Equity, than a trust attaching to the property, as such, for the benefit of either creditor or stockholder.*”

In the last-mentioned case, the Court also quoted with approval from the opinion of Mr. Justice BRADLEY in *Graham v. Railroad Co.*, 102 U. S., 148, as follows :

“When a corporation *becomes insolvent*, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A Court of Equity, at the instance of the proper parties, will *then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.*”

To the same effect are *Wabash, etc., Ry. v. Ham*, 114 U. S., 587, p. 594, cited by the Judge below, and *Fogg v. Blair*, 133 U. S., 534, at p. 541. In the latter, the Court said :

“ We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders ; *it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence.*”

In *Lawrence v. Greenup*, 97 Fed., 906 (C. C. A., 6th Cir.), it was held that a receiver of a bank could not recover from a stockholder a sum received by him on a partial distribution of the assets of the bank, made during voluntary liquidation when the bank was solvent, though it subsequently became insolvent. The receiver contended that he should recover on the theory that the assets of the bank were a “ trust fund ” for creditors. The Court in an unanimous opinion delivered by LURTON, J., said : “ Under the decisions of the courts of the United States, *there is no solid foundation for the contention that the capital of a corporation which is solvent is a ‘ trust fund ’ upon which there is any lien for the payment of corporate debts. The property of a solvent corporation is as much the absolute property of the corporation as is the property of an individual. Neither a corporation nor an individual can so exercise the power of disposition over that which is possessed as to fraudulently defeat the just demands of creditors. But neither the individual nor the corporation can be said, in any accurate sense, to hold his or its property subject to any trust in favor of creditors. When, however, the insolvency of a corporation is established, a condition arises which authorizes a court of equity, in view of the conditional liability of the assets to creditors and the equitable rights of stockholders, to*

treat the property as 'in a condition of trust, first for the creditors, and then for the stockholders.' "

The present situation well illustrates the difficulties which always result from the failure to observe orderly procedure. Although the Bill in Intervention is very lengthy and elaborate and practically charges the directors of the Railway Company and of the Power Company with a conspiracy to acquire for the Railway Company without adequate consideration, the property of the Power Company, the order based thereon (pages 55 to 59) merely permitted the filing of the bill "subject to the limitations hereinafter explained." Thereupon it denied the motion for leave to file a proposed answer to the foreclosure bill, but provided that "the same shall be placed in the custody ^{of} the Clerk of the Court for preservation as a part of the record upon the hearing." The order then provided that "the intervention is expressly made subordinate to said decree (of foreclosure), and such averments in said Bill in Intervention as serve only as the basis of the Intervenor's contention that the decree should be vacated and set aside, shall be treated as surplusage, and ignored in the further proceedings of the case."

Manifestly, it is difficult to determine accurately the averments which properly serve as such a basis and those which do not. Whatever else may be said with respect to the order, it would seem from the language last quoted that the court necessarily decided that the Power Company had suffered default, as alleged in the foreclosure bill; that such default had not been fraudulently procured by those in control of its affairs and that, accordingly, all allegations of the bill to the effect that fraud had been practiced upon the Power Company for the purpose of and with the result that it thereby became unable to pay its interest charges, were overruled.

The order then requires the Power Company to "answer all of the allegations in said bill in intervention relating to the 718 bonds, aggregating \$718,000 par value, secured by the First and Refunding Mortgage, upon which foreclosure is sought here;" that the Railway Company be made a party to the proceeding for the purpose of answering the allegations of the bill "respecting the 718 bonds;" that the complainant (the Trustee under the First Mortgage) and the Power Company answer the allegations of the bill "as to

the matter and manner of the payment of interest due April 1, 1913, under the mortgage herein foreclosed to a portion of the holders of the bonds secured by said mortgage," and that "the failure of any party to answer any averments of said bill in intervention not expressly required by this order to be answered shall not be construed as an implied admission that the same are true."

Clearly, it is practically impossible to determine from such an order the precise allegations of the bill to which answers were required, while some portions thereof appear to be inconsistent with the denial of the right of the Intervenor to answer the foreclosure bill. Thus, if the Bill in Intervention truly avers that the interest due April 1, 1913, on the first mortgage bonds was not paid to certain of the bondholders but was paid to those who deposited their bonds with the so-called New York Committee, mentioned therein, such circumstance would tend to support the allegation that the pretended default in the payment of interest was fictitious, in which event no right of foreclosure resulted therefrom. This was properly a matter of defense to the foreclosure bill and, if relevant at all, the Intervenor should have been permitted to set it up by way of answer. If it were not relevant for this purpose, it is difficult to perceive upon what point it is material, yet answers thereto were required by the Power Company, the Railway Company and the Trustee under the first mortgage. Except for the purpose of illustrating the difficulty experienced by the Appellants in determining the issues to be met, the point is not now material, because it was abandoned at the trial (p. 168).

The Bill in Intervention, as printed, covers 46 pages of the record. The 718 bonds are mentioned but twice, namely, at pages 28 and 42. We will not prolong the brief by quoting the allegations with respect of them. Their substance, however, is that early in 1913 the Railway Company demanded that the Power Company receive from it second mortgage bonds and deliver in their place its first mortgage bonds; that being fully under the control and domination of the Railway Company, the Power Company necessarily acceded to the demand and delivered to the Railway Company \$718,000 of its first mortgage bonds, after the Railway Company had collected in November, 1912, interest on the second mortgage

bonds ; that in view of the fact of the " alleged deficit in the earnings of the Power Company for the year 1912, and in view of the default and foreclosure then planned and anticipated," the second mortgage bonds " had no market value and were to all intents and purposes worthless, and that the said exchange of bonds was *wholly without consideration and was, as to the intervenors and the Power Company, wrongful and fraudulent*, and that the said bonds are not, because of said issue and delivery by the Power Company to the Railway Company, issued and outstanding *and valid obligations of the Power Company*, but that the same should be by this court *called in and cancelled*." And at page 42, " that there has been, as above shown, issued by several devices, bonds of the Power Company to the amount of * * * \$718,000, which are alleged to be valid and outstanding obligations of the Power Company, but which in fact are not such valid and outstanding obligations, which should be *surrendered and cancelled, and if so surrendered and cancelled would thereby greatly reduce the alleged obligations of the Power Company and the interest charges against its income*."

As we have heretofore observed, the entire Bill, despite its length and the fact that it contains every other conceivable charge against the interests controlling the Railway Company, contains no suggestion that, at the time of the transactions with respect to the 718 bonds, the Power Company was insolvent, but alleges that, although the default in interest on the first mortgage bonds was fictitious, because " of the alleged deficit in the earnings of the Power Company for the year 1912," ~~and~~ in view of such default, the second mortgage bonds were worthless, the exchange was *without consideration, and, consequently, fraudulent*.

From the order made on this bill, it would appear that the only allegations which the Railway Company and the Power Company were required to meet, were those directly concerning the 718 bonds. We make no mention of the 107 bonds, because they have substantially been removed from this issue. Relying upon this order the Railway Company and the Power Company have made answer to the specific allegations with respect to the 718 bonds contained in the bill. In so doing, they made no mention of any facts bearing upon the question of the insolvency of the Power Company, because the order

or of an intent to hinder delay and defraud the Interveners

did not require them to do so. Notwithstanding this fact, and, as we have before observed, that the conduct of the trial by the Intervenor, far from seeking to show that the Power Company was insolvent at the time of the 718 bonds transactions, was carefully planned from the standpoint of showing that it was not insolvent, the trial court grounds its opinion upon the finding that the Power Company was insolvent at the time; was known so to be by the Railway Company interests; that the transaction was had with that end in view and for the purpose, as the learned court expresses it, of saving part of the wreckage, and thereupon rests its conclusions upon the fact that the Power Company was "hopelessly insolvent," for which reason the transactions with respect to the 718 bonds were fraudulent and should be set aside at the instance of even the intervening bondholders.

It is elementary and fundamental that a decree, to be operative for any purpose, must be *secundem allegata et probata*, in other words, that it must follow the allegations and proofs of the parties. Since the Railway Company did not know, and had no means of knowing, that the issue of insolvency was to be considered, much less to be the determining factor, if this decree is to go unchallenged, a most grievous legal wrong will have been done the Railway Company without having had its day in court.

Assuming that we have shown that, even as the record is made, within well established rules governing the question of insolvency of corporations, the Power Company was not insolvent in September or December, 1912, and since, as we have also shown, however fraudulent a transaction may be, creditors cannot complain unless the corporation be at the time insolvent, further discussion may be useless. We desire, however, so far as is possible from the record before us, to consider every phase of the controversy and will proceed, therefore, to inquire what facts or circumstances appear in the record which are significant of fraud upon the rights of these bondholders.

Much evidence was introduced by the Intervenor for the purpose of seeking to show that, when the Board of Directors considered the agreement of September 25, 1912, certain of the directors present refrained from voting, while another voted in the negative, with the result that the votes actually cast in

the affirmative were not a majority of a quorum, from which it was gravely argued below that the transaction was not binding upon the corporation. Surely, it will not require the citation of authority to this learned court to demonstrate the proposition that, whatever other rights they may have, creditors are not entitled to question the sufficiency of the authority of corporate agents to effect a given corporate transaction, when the transaction has been fully executed and neither the corporation nor its stockholders have complained. In its simple elements, the question is whether or not the officers of the corporation who acted in its behalf, and, therefore, as its agents, were sufficiently authorized by the corporation as the principal. It is as though one individual, claiming to act as the agent of another, had made a contract in that other's behalf which had been entirely performed by the principal, or by the agent with the knowledge and consent of the principal, and thereafter, without the authority of the principal, a third person assumed to question the authority of the agent. As is fully shown in the brief of the ^{counsel for} appellants, transactions between directors and their corporation, regardless of their fairness or unfairness, may be repudiated and abrogated by the Company itself or by its stockholders or they may be ratified and approved by them; and the failure promptly to repudiate them results in acquiescence and approval; and where there is no suggestion of corporate or stockholders' disapproval, such approval must be assumed. In any event, whether approved or disapproved by the corporation or by stockholders, the transactions here under review have been completed, and intervenors bear no such relation to them as will justify an inquiry on their part as to whether or not they were properly authorized.

We do not lose sight of the fact that our claim of acquiescence and approval will be met by a statement that, since the directors and officers of the Power Company were the same as those of the Railway Company, no one could act directly for the Company in disapproval; and that since the Railway Company owned practically all of the capital stock of the Power Company, few stockholders could act indirectly in its behalf in disaffirming the transactions. The effect of this response is not to indicate that creditors have the right to raise the question of proper

corporate authority, but to disclose that those who were parties to the transactions were the only ones interested therein and that, as both stockholders and creditors, if they so desired, they were entirely within their rights in seeking to better their position in the latter regard. We refrain, therefore, from discussing further the questions relating to proper corporate authority.

~~Taking the record as we find it, it appears (page 236) that Mr. Watson, who was the Power Company's managing director, made a statement as to the financial condition of the company and recommended that \$250,000 be raised to meet its requirements during the coming seven months.~~

Turning now to the testimony, it appears (p. 236) that, at the meeting of the Board of Directors, held September 25, 1912, Mr. Watson, its Managing Director, made a statement as to the Company's financial condition and recommended that \$250,000 be raised to meet its requirements during the coming seven months.

In this connection, it may be well here to advert to certain observations in the opinion of the Trial Judge. Thus, although his opinion characterizes the Power Company as "utterly insolvent" at the time, when he comes to the consideration of the details of the transaction (p. 139), he says:

"The Company needed money, it is true, but if it was going on with the Ox Bow Development the sum contracted for was wholly inadequate for any useful purpose, and if the work at that point were not to be resumed, *there was no urgent need for so large an amount.* Those who participated in the transaction are unable to give any reasonable explanation of the purposes for which the \$250,000 were to be used, and *apparently there is none.*"

These statements wholly ignore the testimony of Mr. Markhaus (p. 425), the then General Manager of the Power Company, and the data contained in a memorandum which he prepared about September 1, 1912, "for the purpose of showing the cash required for the operation of the Company for the last four months of 1912, which was forwarded by him to Mr. Watson, the Managing Director of the Company at New York, shortly after it was prepared and early in September, 1912." The statement will be found at pages 426-429 of the record and, after considering all cash available and

estimating all cash receipts during the four months in question (which would take the Company to the end of the then current year) specified in detail the precise construction items required to be met and demonstrated that, during such four months, the cash deficit would amount to \$203,180. The Minutes of the Directors' Meeting held September 25, 1912, recite that Mr. Watson made a statement as to the financial condition of the Company and recommended that \$250,000 be raised to meet the requirements of the Company "*for the next seven months*" (p. 236), which statement is wholly consistent with the estimate for four months sent to Mr. Watson by the General Manager at Boise. In testifying on this subject in November, 1913, fourteen months later, Mr. Watson stated (p. 273) that as he remembered it, they were being pressed for monies for the corporate purposes of the Company and the necessity that they had to provide money for making extensions and buying electrical apparatus, etc., to handle their business (p. 274); that he is certain, generally speaking, that they had a financial program that required that sum of money, but that he did not then remember it in detail; that it was not a temporary makeshift (p. 275); that there was nothing definite decided about the Ox Bow; that they did not have the money to go on with it at that time, but "we all felt that it was going to be continued at some time in the near future" (p. 276); *that shortly before he left the management of the Company the conclusion was first reached that it could not go on and keep on paying interest and keep on its feet as a going concern.* And Mr. Mainland, one of the witnesses called by the Intervenor, testified (p. 316) that Mr. Watson *ceased to be Managing Director of the Power Company about May 1, 1913.*

A number of the other directors of the Railway Company and of the Power Company, men of large interests and varied activities in New York, but who had no close association with the practical details of the business, were also asked by counsel for the Intervenor if they could recall in detail any of the purposes for which the \$250,000 was to be used and, speaking generally, at the time when they were examined, which was in the fall of 1913, they did not recall any of the details. In view of the lapse of time, of the fact that, when the matter was considered, undoubtedly, they had before them the

written estimate prepared by the General Manager, and of the great number and character of the items appearing thereon, can it be said to be surprising that they were unable to recall it in detail and does such failure of recollection adequately justify the conclusion of the trial Court that apparently there was no reasonable explanation of the purposes for which the \$250,000 were to be used? As noted, the Court appeared to be influenced by the circumstance that "there was no *urgent need* for so large an amount." Just what is comprehended within that expression, we cannot, of course, be certain. The record, shows, however, that on October first, six days following the meeting, the semi-annual interest on the First Mortgage Bonds was payable; that on November first, the semi-annual interest on the Second Mortgage Bonds was payable, and that, within the then succeeding three months, in accordance with the estimate of the General Manager, large payments would be required in connection with construction work, extensions and power-lines then under way. The record also shows that the money was only advanced as required and that (p. 258), it was actually paid over as follows: October 4, 1912, \$100,000; November 1, 1912, \$20,000; December 11, 1912, \$60,000; December 17, 1912, \$40,000, and on January 3, 1913, \$30,000. It also appeared that instead of \$500,000 to which the Railway Company was entitled under the terms of the agreement, only \$440,000 of First Mortgage Bonds were deposited as collateral for these loans (p. 258).

In all fairness, is it possible that directors must not provide several months in advance for the requirements of their Company, lest they subject themselves to a charge that, because all of the money was not, at the time when the arrangements were made, "urgently" required, they were prompted by ulterior motives; and because, more than a year thereafter, they cannot recall the details of the Company's then requirements, especially when so complex as those here shown, is that fact to be considered significant of insincerity on their part in connection with the transaction?

As bearing upon the necessity for the Funds and the reasons therefor, the evidence also shows that the great difference between the results of operations of the Power Company during 1912 and those of preceding years, as shown in state-

ments introduced in evidence by the Intervenor, was that, until 1912, all interest on the bonds issued in connection with the Ox Bow development had been charged to capital, and that in 1912 such interest amounted to \$133,442 90 (page 436). *and was also charged to earnings* Intervenor's Exhibits 30 and 32 (pages 221 and 226, note a), show that the aggregate of the bonds so issued was \$2,856,846. Exhibit 32 also shows that, despite the favorable net earnings, as shown in Intervenor's Exhibit 40 (page 231), in 1911, after charging against earnings the "contingent interest" a surplus for the year ^{would have} remained of only \$5,800. It also appears (page 435) that during the year 1912 \$23,339.80, which, during 1911, had been charged to "development," was in 1912 also charged against earnings as part of the operating expenses. It further appears from Exhibit 40 that the net earnings for 1912 were \$17,000 less than in 1911. Accordingly, had the net earnings for the two years been the same and had the \$23,339.80 of expenses ^{and the "contingent interest"} been charged against earnings in 1911 ~~instead of 1912~~, the net result of operations during the two years would not have greatly varied. The record also shows that, at a meeting of the Executive Committee of the Power Company held August 30, 1912 (page 232), the matter of raising additional funds "to take care of the extension of distributing systems and the building of transmission lines was taken up and discussed," and a resolution adopted to the effect that the general manager should prepare and submit a statement showing the expenditures that have been made by the Company "in connection with the building of transmission lines, sub-stations and distributing systems since July 1, 1910, and that the same should be forwarded to the directors for approval, for the purpose of being filed with the trustee under the mortgage, so that additional bonds may be secured for the raising of funds." This meeting was attended by Messrs. S. L. Fuller, William Mainland and R. W. Watson, as well as by the operating managers at Boise, Messrs. R. L. Bacon, H. F. Dickey and O. G. F. Markhus (p. 232). It also appears that the resolution above mentioned was offered by Mr. Watson and seconded by Mr. Mainland, who was the company's president, who had been such since its origin and, with his brother, had entirely controlled the corporation until the contract of September, 1911, was made, but who is not included by the Intervenor

among the arch-conspirators conjured up by their imaginations.

Mr. Markhus testified that, about September 1, 1912, he also prepared a statement of cash requirements of the Power Company for the purpose of showing the money that would be necessary to be raised for its operations during the last four months of 1912, which was forwarded to Mr. Watson at New York, early in that month. As we have before noticed, the statement appears at pages 426 to 429 of the record and discloses that, in addition to estimated net returns from operation during the four months, the net cash requirements would be \$203,180.

It cannot, therefore, well be contended that Mr. Watson's estimate of \$250,000 for the coming seven months was extravagant, in view of the general manager's estimate for the four months ending December 31 and the other circumstances to which we have called attention. At least, the transaction was open and above-board; and the record contains no impeachment of any kind of Mr. Markhus's estimate nor of the propriety of that of Mr. Watson, except the innuendoes of counsel, which seem to have been adopted by the learned Trial Court because, in November, 1913, neither Mr. Watson nor other New York directors then examined, could recall the details of the Company's requirements for which, in arranging for the \$250,000, provision was intended to be made.

The record of the meeting of September 25, 1912, further shows that, after Mr. Watson had explained the Company's money requirements, a proposed agreement was presented to the meeting between Kissel, Kinnicutt & Company, the Power Company and the Messrs. Mainland, who were the parties to the agreement of September 19, 1911, whereby Kissel, Kinnicutt & Company first became interested in the Power Company's securities, which proposed agreement recited that the Bankers had purchased \$1,325,000 of the second mortgage bonds, \$1,500,000 of which they had agreed to purchase under the provisions of the 1911 agreement; that they were prepared to purchase the remaining bonds, which would have netted the Power Company \$140,000, but were unwilling to purchase additional bonds; that the Power Company would require during the following six months \$250,000, which \$250,000 the bankers agreed to procure for the company in

consideration of being released from their obligation to purchase the remaining \$175,000 of second mortgage; that the Bankers would procure the Railway Company to loan the Power Company the \$250,000 at 6 per cent. interest, of which \$100,000 was to be advanced at once and the balance, whenever requested *during the following six months*; that each loan so made *should run for a period of six months* from the date thereof, *with an option to the Power Company to renew the same for a further period of six months* at the same rate, and all were to be secured by the Power Company's first and refunding mortgage five per cent. bonds, equal at their face value to twice the amount of the loan.

The agreement also provided that, as a further consideration to the Railway Company for making the loan, the Power Company would, as the Railway Company, from time to time, requested, exchange \$500,000 of its first and refunding five per cent. bonds for an equivalent face amount of the Power Company's second mortgage six per cent. bonds, which the Railway then owned. This agreement was, according to the minutes, duly authorized and, although Mr. William Mainland's recollection is that he refrained from voting on the resolution, *he executed the agreement in behalf of his firm* (pages 236 to 241).

Pausing for a moment to consider this agreement and its bearing upon the accusations of fraud, whatever else may be said of the arrangement, in what manner are the circumstances surrounding its making indicative of an intent to defraud these Intervenor? In the first place it released the Bankers from the necessity for making an additional investment of \$140,000 in the second mortgage bonds. Surely this phase of the contract did not directly concern the Intervenor, and whether or not, as between the Corporation and the Bankers, it was a wise or proper transaction appears to us, therefore, to be of no moment. If, as the court concludes, the company was then insolvent, a very much simpler method of terminating the Bankers' liability would have been to place the company in the hands of a receiver. Instead of any effort in that direction, the agreement recites, and the statement is not challenged in any way, that the Bankers were prepared to complete their contract.

Had the company then been deemed to be insolvent and had they then considered, and if it were a fact, that the second mortgage bonds were worthless, it is most confidently submitted that the bankers were *ipso facto* relieved from any further obligation to purchase the remaining bonds.

Benedict v. Field, 16 N. Y., 595.

Bruce v. Burr, 5 Daly (N. Y. Common Pleas), 510, affirmed 67 N. Y., 237.

Harris v. Hanover National Bank, 15 Fed., 786.

Roberts v. Fisher, 43 N. Y., 159.

Ex parte Chalmers, L. R. 8 Ch., 289.

We do not pause here to consider these authorities in detail, because we propose to discuss them at some length under a subsequent point, and the circumstance that the agreement recites that the Bankers were willing to purchase the additional bonds is mentioned now only as persuasive evidence that they did not then consider the Power Company insolvent and, accordingly, that they did not consider the second mortgage bonds worthless.

The second significant fact in this connection is that the entire \$250,000 was not to be loaned at once, but was to be available at any time during the succeeding six months. It was in fact all loaned by January 3, 1913. This is significant, because, had the arrangement for the loan of the \$250,000 been a mere pretence, the \$100,000 advanced at once would not have been followed up by subsequent advances, and the company would not have been permitted to continue its business during the six months period. In other words, had the arrangement been a mere cloak for fraud, as small a sum as possible would have been advanced immediately, the authorized exchange of second for first mortgage bonds would have been made immediately and the company would then have been left to shift for itself, instead of which it was maintained and sustained by the Railway Company until an impossible situation had been created by these Intervenor; and until the cut-throat competition, actually introduced into Boise in January, 1913, had made itself felt for a period of a year, whereupon, these Intervenor having attacked the good faith of the Railway Company's efforts to so reorganize the business that it would have a chance to meet the competition and survive, the Railway Company's interests succumbed

to the inevitable (page 514), withdrew their opposition to the Intervenor's *motion for the appointment of a receiver* and such receiver was appointed.

The third significant fact in the agreement is that the loans were to be made upon notes which were to be payable six months after their respective dates, and that the Power Company was to have the right to renew each of them for a further period of six months ; and the notes given for each loan were in fact each payable six months after date (page 430). Had they been made as part of a conspiracy merely to obtain the first mortgage bonds and had the Railway Company interests then intended that the Power Company should shortly cease to transact business, is it natural to suppose that the loans would have been made upon six months' time? The advisable procedure would rather have been to make the notes payable on demand, in order that the holders might have been free to exercise their rights from day to day as they considered that circumstances required ; and the fact that they were willing that each loan should run six months and be subject to renewal for a further period of six months can, it is most confidently submitted, be considered significant only of an expectation that the company would continue in business during that time, and, indeed, that its then financial troubles might be overcome and its business prove a successful enterprise.

The learned Trial Court appears to have considered that the various steps taken are to be deemed significant of a conspiracy, because there was no good reason why the Power Company did not sell its first mortgage bonds instead of hypothecating them to the Railway Company on the basis of fifty per cent. of their face value. Assuming, however, that the parties were entirely sincere in the transaction, were not the Power Company's interests better served by pledging its bonds for long time loans than by seeking to sell them in the market at a time when, because of the first honest statement of its earnings, they were showing a deficit?

During the trial the auditor of the Railway Company took from the books of the Power Company a statement showing the prices which the company had realized for all of its bonds, which showed that of the \$2,494,000 sold others, only

80 per cent. had been realized for \$1,346,000 face amount thereof and 85 per cent. for \$1,076,000 face amount thereof (Exhibit G, page 437). The detailed statement of these sales (pages 439-453), discloses that, with the exception of the 718 held by the Railway Company, only \$53,000 of the first mortgage five per cent. bonds have been issued; and that they brought the following prices:

Amounts	Prices
\$10,000.....	<i>Journal</i> 100 ^{\$1.00}
5,000.....	95
3,000.....	75
30,000.....	70
3,000.....	75

The table further shows that all of these bonds were disposed of prior to 1912 and, therefore, during a period when, by reason of the fact that interest on about \$2,000,000 of the bonds issued for the Ox Bow development, was charged to construction or capital account instead of against the earnings, the company was apparently showing a considerable surplus of earnings. In view of those prices, considering the large deficit from operations, the approaching competition and other unfavorable circumstances existing in the fall of 1912, can it be reasonably supposed that the five per cent. bonds would have brought in the market more than 60; and, if so, from the standpoint of the company's reputation and credit, was it advisable to offer them to the market at all? Surely, there cannot be two opinions on this point, and, therefore, if the situation will be only considered from a sane and unprejudiced standpoint, it would seem most obvious that the best interests of the company required that, as between seeking to sell the five per cent. bonds and pledging them as collateral, the latter was the far wiser course.

Whatever else may be said of the further provision in the contract whereby the Railway Company was given the right to exchange Second for First Mortgage Bonds, it is there set out in so many words, no effort at concealment was made on the part of any one and, although the evidence would seem to show that Mr. Thompson, one of the directors, intended at least to be understood as voting against this provision and

that Mr. William Mainland, who presided at the meeting, failed to vote thereon, as well as Mr. Sinclair Mainland and Mr. Fuller (the two latter concededly because they considered that they were interested parties under the terms of the contract) as before observed, the contract was actually made, signed by the Vice-President of the Power Company, by Mr. William Mainland, in behalf of his firm, and by Mr. Fuller in behalf of Kissel, Kinnicutt & Company. Whatever technical effect may have resulted from the failure of the Messrs. Mainland and Mr. Fuller to vote for the purpose of making a majority of the quorum, equitably at least, their assent to the agreement, as disclosed by the signature of the Mainland firm and by Mr. Fuller's signature in behalf of his firm, would seem to remove any chance for controversy as to what was their ultimate attitude towards the transaction.

At all events, the evidence clearly shows that at least \$440,000 of the First Mortgage five per cent. bonds were first deposited as collateral to the notes for \$250,000, but that the exchange of the \$500,000 of bonds as authorized, was not made until January 3d and January 6, 1913 (p. 259), although more than \$300,000 thereof were in hand when the agreement was made, the balance having been received during December and January, 1913 (pp. 397 & 398).

Are these acts, and is the sequence of events significant of an intention to defraud anyone or of an intention to discontinue the business of the Company and make away with as much of the wreckage as possible? Assuming that the actors in the transaction possess but a small amount of the ingenuity credited to them by the Intervenor, is it possible that they did not appreciate that a far simpler way to obtain the First Mortgage Bonds would have been to immediately deposit those in hand as collateral to a demand note, and, shortly thereafter, call the note, sell the collateral and buy it in. Indeed, the very baldness and awkwardness of the transaction for the exchange of the bonds is only consistent with the idea that the parties considered that they were acting properly and rightfully. At all events, whatever their thoughts or beliefs may have been, the openness with which the transaction was accomplished, the complete record thereof that was made, and the deliberation shown in rendering it effective, are so wholly inconsistent

with an intent to defraud anyone, that only the mind of a Machiavelli can discover reasons to the contrary.

After this agreement had been considered at the Directors' meeting, according to the Minutes, a resolution was unanimously adopted authorizing its execution (p. 245). In addition to the directors representing Kissell, Kinnicutt & Company, the Syndicate or the Railway Company interests, assuming merely for the purpose of this argument that such directors represented the same interests, it will be recalled that the meeting was attended by Mr. A. E. Thompson, the attorney for Messrs. Mainland and by the two Mainlands, and there is not a syllable of evidence contradicting the record to the effect that *all of the directors voted in favor of the agreement whereby the Railway Company was to make the loan of \$250,000, and, in part consideration therefor, was to have the privilege of exchanging the Second Mortgage Bonds for the First Mortgage Bonds.*

As we have before pointed out, the agreement to release Messrs. Kissell, Kinnicutt & Company from their obligation to purchase the additional Second Mortgage Bonds is only of importance in the event that the Company was not insolvent and that the Second Mortgage Bonds were not considered worthless. If such were not the case, and the corporation were complaining, the agreement with the Bankers would be of some consequence, and it would be proper for the Court to consider whether or not the stipulation, whereby the Bankers agreed to procure the \$250,000 loan, did supply a legal consideration for the release. Since it is not complaining, the question is wholly immaterial so far as these Intervenors are concerned. Were the subject one which the Court should consider, however, it is most confidently submitted that, in view of the existing deficit in the earnings of the Power Company and of its absolute requirements during the succeeding three months, not to mention the following three months, for which provision was intended to be made by the loan, whatever else may be said of the transaction, it cannot convincingly be claimed that it was not of the utmost importance to the Power Company that funds for its needs should be provided. Whether or not the consideration given was too great is, we submit, a question which does not concern these Intervenors, and one which, therefore, it is useless to prolong the brief for the purpose of discussing. If the Bankers were im-

properly released from their contract, the corporation and its stockholders are not without a remedy, but such remedy is personal to the corporation and the Bankers.

B.

It also appears from Interveners' Exhibit 3 (250-256) that, on Sept. 27, 1912, two days after the Directors Meeting, a meeting of the executive committee was held at which both of the Mainlands were present; that such meeting, by the votes of the two Mainlands and of Mr. Watson, authorized the making of an agreement which, among other things, recited (p.253) that the Bankers "have for a valuable consideration been released from their obligation to purchase said \$175,000 face value of said bonds"; also that, "from various causes, the Bankers have been required" and have from time to time, advanced far more money than was originally contemplated in the agreement of September 1911 and "have otherwise assisted beyond their contract obligation in carrying out the spirit" of said agreement. These minutes are signed by Mr. Sinclair Mainland as Secretary (pages 253 & 256). These minutes are impugned in no manner whatsoever. Accordingly, whatever may have been the disposition of the Messrs Mainland on September 25, 1912, two days later, they evidently acquiesced fully in the arrangement to modify the original agreement in a variety of ways, among which were a number entirely dependant upon the release of the provision relating to the \$175,000 bonds.

... to Denver to Bates & Rogers Company 100 shares of full-paid common stock and 50 shares of full-paid preferred stock of the Railway

with an intent to defraud anyone, that only the mind of a Machiavelli can discover reasons to the contrary.

After this agreement had been considered at the Directors' meeting, according to the Minutes, a resolution was unani-

and one which, therefore, it is useless to prolong the brief for the purpose of discussing. If the Bankers were im-

properly released from their contract, the corporation and its stockholders are not without a remedy, but such remedy is personal to the corporation and the Bankers, and does not affect the question of the capacity and right of the Power Company to make the contract with the Railway Company. Evidently, all of the directors present, both those representing what may be termed the Railway Company interests and those representing what might be called the other interests, considered that the Power Company required the money obtained under the contract and that the terms under which it was to be obtained were proper.

Under the assumption that the parties intended and expected the business of the Power Company to continue, which, considering the evidence, is the only justifiable assumption, in addition to the benefit to be derived by the Power Company through obtaining funds to continue the construction work then under way and planned, one of the most important considerations, from its standpoint, was to keep its fixed charges down to the lowest possible sum ; and, in this connection, the fact must be kept in mind that each Second Mortgage Bond exchanged for a First Mortgage Bond reduced the interest charges to the extent of one per cent., which, in the case of the entire \$718,000 of bonds, meant a saving to the Company of \$7,180 per year.

The second of the transactions of which complaint is made was authorized at a meeting of the Executive Committee, attended by all five of the members, on December 27, 1912, at which Mr. William Mainland acted as Chairman (pp. 400, 401). After the written contract of November 29th with Bates & Rogers Construction Company (pp. 401-404) was laid before the meeting, as evidence of the terms of the settlement of the controversies between the two companies, it was seen that it provided for the delivery to the Bates & Rogers Company of \$25,000, face value, of the Power Company's Consolidated or Second Mortgage Bonds, together with an agreement on the part of the Railway Company to purchase the said bonds at any time after eighteen months at 80 ; also that the Power Company was to deliver to Bates & Rogers Company 100 shares of full-paid common stock and 50 shares of full-paid preferred stock of the Railway

Company. Thereupon, an agreement between the Bates & Rogers Company and the Power Company was presented to the meeting, which had theretofore been executed by both companies under date of December 16, 1912 (pp. 405, 406), and which provided for the cancellation of the contract between them, included mutual releases and released and discharged the Mainland firm from all liability under their guarantee to the Bates & Rogers Construction Company of the performance of the Power Company's contract. Following this there was also presented to the meeting a contract between the Power Company and the Mainlands, whereby the Power Company delivered to the Mainlands \$60,000, face amount, of its First Mortgage Five Per Cent. Bonds, as security against any liability incurred by them as endorsers upon a note given the Bates & Rogers Company which was to mature November 29, 1913, which agreement had also been executed on December 16, 1912 (pp. 407, 408). Thereupon, it was unanimously resolved that the action of Mr. Mainland in effecting the settlement with Bates & Rogers, his execution of the Company's note and also that his execution in its behalf of the agreements in question were duly ratified and approved.

Thereafter, an agreement between the Power Company and the Railway Company was presented to the meeting, which recited the adjustment of the controversy between the Power Company and the Bates & Rogers Company and the requirements thereof so far as the Railway Company was concerned, provided that the Railway Company should deliver to the Power Company 50 shares of its full paid preferred and 100 shares of its full paid common stock and that it should execute and deliver to the Bates & Rogers Company an agreement in the form of that thereunto annexed and marked Exhibit "A," which is the agreement providing for the purchase by the Railway Company from the Bates & Rogers Company of the \$25,000, face value, of the Power Company's Consolidated or Second Mortgage Bonds at 80.

The record contains testimony on the part of the Messrs. Mainland to the effect that they did not recall having passed upon the said agreement of December 17th between the Power Company and the Railway Company (pp. 418-421). The rec-

ord also discloses, however, that Mr. William Mainland executed the settlement agreement of November 29th with the Bates & Rogers Company (p. 404) ; that he executed on behalf of the Power Company, as its President, the agreement between the Bates & Rogers Company and the Power Company of December 16 (pp. 405, 406) ; that he executed on behalf of the Power Company, as President, and on behalf of his firm, the agreement between them of December 16, 1912 ; and that he also executed, as President of the Power Company and as President of the Railway Company, the agreement between them of December 17, which includes the right on the part of the Railway Company to exchange additional Second Mortgage Bonds for First Mortgage Bonds up to the sum of \$500,000. In other words, this particular agreement, which the learned Court below especially anathematizes as unconscionable on the part of the Railway Company, was executed in behalf of the Power Company as well as in behalf of the Railway Company, by Mr. Mainland, who was not one of the Bankers, who was not a member of the Syndicate, who, with his brother, entirely controlled the Power Company before the Bankers made the contract of September, 1911, and who must, therefore, be considered as representing all of the stock other than that originally acquired by the Bankers and by them transferred to the Railway Company.

In connection with this transaction, it will be recalled that the uncontradicted evidence is that a disagreeable and difficult situation existed between the Power Company and the Bates & Rogers Company resulting from a contract made some years before for the development at the Ox Bow ; that the matter of its cancellation or of making some arrangement to be rid of the liabilities thereunder had been under negotiation for many months. The general considerations affecting the desire to terminate the contract are set forth in the testimony of Mr. Watson at pages 266-268. As a matter of fact, the negotiations had been under way since the fall of 1911, when Mr. Watson first became the Power Company's Manager (p. 268). On July 24, 1912, a proposal of the Bates & Rogers Company was presented to the Power Company's Executive Committee by Mr. William Mainland (pp. 268-270) under which, as the

result of the negotiations theretofore had, the Bates & Rogers Company offered to adjust their claims at something more than \$85,000. This offer was rejected and a counter proposal authorized (pp. 270 & 271). Mr. Watson also showed that in June, 1912, Mr. Blackwall, of Messrs. Veile, Blackwall & Buck, the Power Company's engineers, wrote him that he had been conferring with Mr. Rogers, of the Bates & Rogers Company ; that the latter were very anxious to go on with the work on the basis of the unit prices in the contract, and that, if the work should be done on that basis, it would cost \$100,000 more than if the Company did it directly ; and Mr. Blackwall's letter is in evidence (p. 280).

Before passing to a further consideration of this contract, we pause to refer to the only testimony in the case with respect to the actual exchanges of bonds made under the two contracts. The testimony was given by Mr. G. E. Hendee, who was the Secretary and Treasurer of both Companies. As before shown, he testified that the \$250,000 was loaned at the following times and in the following amounts :

October 4, 1912	\$100,000
November 1, 1912	20,000
December 11, 1912	60,000
December 17, 1912	40,000
January 3, 1913	30,000

He also testified that \$440,000 of the First Mortgage Five Percent Bonds were first put up as collateral against these loans and that afterwards they were exchanged for a like amount of Consolidated Six Percent Bonds, and the Railway Company thereupon accepted the Consolidated Bonds as collateral for the loans (p. 258). He also testified that the Railway Company delivered to Bates & Rogers Company the 100 shares of common and 50 shares of preferred stock and \$25,000 of the Consolidated Bonds, that the "requisition" (evidently the witness intended to say "contract" or "agreement") stated that the Railway Company would purchase the bonds at 80 under the terms of the settlement agreement with the Bates & Rogers Company (p. 259).

The witness then testified that, under the two agreements of September 26 and December 27, 1912, referred to in the

Minutes of those dates, the following exchanges of bonds were made :

January 3, 1913	\$ 38,000
January 6, 1913	492,000
January 13, 1913	65,000
February 10, 1913	123,000

Thereupon, he gave the serial numbers of the bonds received by the Railway Company, all of which are included among those requisitioned, issued and delivered to the Railway Company as shown by the stipulation appearing at pages 396-398 of the record. The witness also stated that none of the loans had ever been paid to the Railway Company.

In addition to the matters hereinbefore mentioned, in speaking of the September transaction, the learned Trial Court, in referring to the agreement on the part of the Bankers to procure the \$250,000 loan from the Railway Company, characterizes the Railway Company as being then "wholly insolvent" and, in referring to the loan of \$250,000, states that "under the conditions created by the agreement the possibility that there ever would be a redemption (of the First Mortgage Bonds originally pledged as collateral) was so remote as to be negligible"; states that the surrender of the obligation "of the Syndicate to take \$175,000, face value, of the Seconds at 80" was, "without any real consideration" and, as we have before shown, concludes that there is but one rational explanation of the agreement, namely, that the interests in control of the Railway Company, having concluded that the Power Company was hopelessly insolvent, resorted to this expedient for saving to themselves as much of the wreckage as possible. The only evidence in the record with respect to the condition of the Railway, at that time, is contained in Intervenor's Exhibit 28 (pp. 213, 214) and Intervenor's Exhibit 29 (pp. 216-218). From the former, it appears that, during the month of September, 1912, the Company earned a surplus of approximately \$3,400; that for the nine months ending September, it had earned a surplus of a little more than \$6,800; that for the month of September it expended in construction work \$69,637, and during the nine months then ending \$267,463.

From Exhibit 29 we find that up to September 30, 1912,

additions had been made to Property, Plant and Equipment, aggregating \$627,463, and that during the month of September such additions had been made to the extent of \$79,637.

Concerning the condition of the Company thereafter, from Intervenor's Exhibit 5 (pp. 205, 206), we find that for the year ending December 31, 1912, the earnings show a surplus of \$14,527 :

That on December 31st, the Construction Account for the year was	\$440,235
Whereas, on September 31st, it had been	267,463
<hr/>	
Showing an increase during the 3 months, of ..	\$172,772

From the condensed balance sheet of December 31st (Intervenor's Exhibit 27, pp. 208-210) we find that total additions to Plant during the year 1912 were ~~\$626,235~~ ^{626,235}

Whereas, up to the end of September such additions aggregated	<u>357,463</u>
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Thus showing an increase during the 3 months of \$262,772

The Balance Sheet of December 31, 1912, also shows total assets of \$23,803,000, and total liabilities, excluding the Capital Stock, of somewhat more than \$16,000,000, thus showing a surplus of about \$7,000,000.

The only other evidence in the record bearing upon the question is that about December 23, 1913, more than a year after the Bates & Rogers transaction, and more than 15 months after the loan of \$250,000, a Receiver for the Company was appointed, upon its confession of insolvency (p. 381).

Not only do we have the figures above mentioned, but there is no contradiction in the record, and no suggestion of a contradiction, of the fact that the Railway Company did actually loan the Power Company the \$250,000 as provided in the September contract.

Under this state of facts, and in view of the law regarding the proper meaning of the word "Insolvency" as applied to corporations, we trust that the Court will not consider the statement unjustified if we characterize the language of the learned Trial Court in this regard as intemperate; and if we again suggest that it is only intelligible upon the assumption that, at the end of August, 1914, when the opinion was written, the Court was subconsciously affected by the circumstance,

that, through its Receiver, it had then been administering the affairs of the Railway Company, as well as those of the Power Company, for a period of eight months, and, that it was transferring to September, 1912, the conclusions which it had then reached as to the possibility of realization upon the Railway Company's properties in August, 1914, by which time, we presume that properties of that particular character were of less selling value in the home community of the learned Court than has ever been the case since the inhabitants of the community dwelt in wigwams and, for the sake of the development of the community in the future, let us hope of less value than will ever again be the case.

The learned Court further said that, under the conditions *created* by the agreement, the possibility of redemption of the pledged bonds was so remote as to be negligible. If by that statement is meant that, in view of the limited quantity of first mortgage bonds to which the Company was entitled by reason of the improvements and additions to its property, if the exchange privilege was availed of, small opportunity would be afforded to redeem the bonds as pledged, the remark is understandable ; otherwise it is not, because, with the security markets in the condition which obtained at that time, with the Company showing a large deficit in its earnings, and especially in view of the fact that most of the five per cent. bonds had been put out at 70 under most favorable statements of earnings (although such statements were unwarranted), it would have been the height of folly to have then forced the first mortgage bonds on the market ; and by the terms of the agreement the securities ultimately held in pledge could not be sold until one year after the respective loans were made, at which time it was possible that the condition of the Company would be improved and, at least from the standpoint of human hopes, it was probable that financial conditions would have improved.

The Court continues :

“ The transaction, therefore, practically amounted to a sale of between \$200,000 and \$500,000 face value of the first mortgage bonds for an equivalent amount of seconds, which it is apparent must have been wholly valueless if the first were worth less than their face.”

From the tables to which we have previously referred (pp. 437-453), it is shown that the Company had never realized par on any of its six per cent. first mortgage bonds, except \$10,000 thereof, and that all but \$72,000 thereof had been sold at 80 and 85, the greater proportion at the smaller price. Under its most favorable statements of earnings, therefore, the Company practically never realized par for even its six per cent. first mortgage bonds; notwithstanding which, the longer of the tables last mentioned shows that, in January, 1911, it sold \$50,000 of the seconds at 85, and \$200,000 at 80; that in February of the same year it sold \$75,000 of its seconds at 80; that in March of the same year it sold \$49,000 thereof at 80; that in April of the same year \$25,000 thereof were sold at the same price; in May \$7,000 at the same price; and in June \$7,000 at the same price. In addition to which, after the dates mentioned, the Bankers purchased \$1,325,000 thereof at the same price. Accordingly, judged by these transactions, the observation of the Court to the effect that the seconds were wholly valueless if the firsts were worth less than their face, would seem to be a glaring *non sequitur*.

As the Railway Company was entitled to exchange \$500,000 first mortgage five per cents. under the September contract, and \$718,000 were exchanged under both contracts, it is only proper to assume that \$500,000 of that amount was exchanged under the first contract. Considered, therefore, in the worst possible light, since the Power Company received the entire \$250,000 from the Railway Company, the transaction under the first contract might be said to represent a sale by the Power Company of its five per cent. first mortgage bonds at 50 plus whatever value the parties then fairly considered the second mortgage bonds to possess. If the value of the second mortgage bonds was then placed as low as 25, the realization by the Railway Company on the first mortgage 5s was, notwithstanding the then conceded fact that its earnings showed a large deficit, as satisfactory as previous sales of the same bonds under conditions when its earnings purported to show a large surplus. And if, as we most confidently contend, the circumstances then surrounding the transaction of the business of both the Power Company and the Railway Company, emphasized by the subsequent expenditure for construction

and other additions to the plant and equipment of both companies, aggregating during the succeeding three months more than \$400,000, disclose clearly that the parties in interest then considered that both companies could and would be maintained as going concerns, is this Court, or any other court, justified in concluding that the second mortgage bonds were not then honestly considered by the parties to be worth more than 25 cents on the dollar?

So far therefore as the transactions under the first contract are concerned, had the parties really under attack here been notified by the pleadings herein that the intervenors attacked the transactions in question upon the ground that the Power Company was at the time insolvent and known by them so to be, in view of the evidence in this record, it would seem to be beyond peradventure that, under the proper definition of insolvency, they could have readily met and repelled such an attack. The point upon which we insist in that connection is, however, that the conclusions of the Court in that regard are assumptions pure and simple and that, if assumptions are to be indulged, they should be based upon the evidence; that the record does contain evidence in actual figures disclosing what both companies were then doing, the only reasonable and justifiable conclusion from which is that the parties who were then financing them intended to continue so to do, in which event neither of the companies was insolvent and the future alone could tell whether the great investments in both properties then being made and others which it was anticipated would follow, would or would not ultimately result in the financial success of both ventures.

We do not now consider further the Court's remark that the obligation to take the additional \$175,000 face value of second mortgage bonds was that of the Syndicate, because we will subsequently discuss that finding in some detail.

After concluding that the transaction was an "expedient for saving * * * as much of the wreckage as possible," learned trial Court observes that :

"Putting aside for the moment all question of the rights of these intervenors, it is plain that there was a breach of trust on the part of the officers of the Power Company and a disregard of the rights of the holders

of approximately \$166,000 face value of consolidated bonds which had been sold upon the market and were held by the general public," etc.

This statement is so wholly gratuitous on the Court's part that we would not advert thereto did we not consider that its inclusion in the opinion, concededly without relevance to the real issues, is significant of a severely prejudiced state of mind, which, in addressing himself to the real issues before him, he found it impossible to overcome. We do not make this remark by way of individual criticism but only as indicating the extent to which able courts are sometimes affected by considerations other than those of abstract reason and as further suggesting that the trial Court was influenced by sentiment in reaching its conclusions.

By way of antidote to such sentiment, we may be permitted to point out that the table of sales of the Company's bonds (pp. 439-453) show total sales of the consolidated 6s, or second mortgage bonds, of \$413,000 up to June 13, 1911. The New York bankers became interested in the Power Company in September, 1911. The evidence shows (p. 260) that at the present time the Railway Company holds all of the outstanding second mortgage bonds except the \$166,000 mentioned by the trial Court and \$30,000 held by the Bates & Rogers Construction Company. In other words, not only were the New York bankers or the Syndicate or the Railway Company not parties to the sale of the \$166,000 of seconds, the position of the holders of which appealed to the learned trial Court, but, after becoming interested in the property, they had purchased the difference between the \$413,000 thereof theretofore sold and the \$166,000 thereof now outstanding, or \$247,000 of such bonds. In considering the intentions of the Bankers, of the Syndicate and of the Railway Company, it must also be kept in mind that every bond held by the intervenors or any others, was ^{issued} ~~purchased~~ before the Bankers, the Syndicate or the Railway Company had any interest in the Power Company; that, after the Bankers first acquired their interest, they did nothing but expend, in the improvement and development of the property, the money with which they had purchased the Company's bonds, every one of which is now in their hands. Accordingly, to the extent that the human influences

involved are to be considered in connection with the duty to the public of those responsible for the administration of the affairs of these companies, and particularly for the sale of its securities to innocent holders, without desiring to enlarge too much upon the situation, we may at least say that the situation of the Bankers, of the Syndicate and of the Railway Company is above reproach. Indeed, had not the Bankers expended upon the property of the Power Company the great sums shown even by this record, in view of subsequent events, these very Intervenor and all other holders of the Power Company's first mortgage bonds would indeed have been in a pitiable plight. We close the discussion of this particular thought with the recurrent reminder that the holders of the \$166,000 of second mortgage bonds are not the complainants here, and that, to whatever other encomiums these Intervenor and their counsel may be entitled, any well defined desire to protect the interests of the second mortgage bondholders cannot be said to be one of them.

We offer but one further thought in this connection, namely, that the learned trial judge is rather illogical in basing his condemnation of the exchange of bonds upon the circumstance that the seconds were wholly worthless, and in charging the Railway Company with a breach of trust toward the other holders of the second mortgage bonds growing out of the same transaction. In other words, if the consolidated bonds were entirely valueless, what difference did it make to the other holders thereof what disposition the Railway Company made of its second mortgage bonds?

As we have heretofore pointed out, both upon reason and authority, the officers and directors of a corporation bear no trust relationship whatsoever to its creditors, be the latter secured or unsecured. We most respectfully repeat, therefore, that it was ill advised for the trial Court to characterize the transaction as a breach of trust on the part of the officers of the Power Company, especially as the statement was not required for the purposes of the decision. As should be the case, judicial utterances have great potency. It is well known that all opinions of the federal courts are preserved in written form and published broadcast to the world. In the opinion of the learned Court below, names are mentioned in connection with statements and conclusions involving findings of fraud in

business transactions; names of honorable men, who are naturally jealous of the places which they have made for themselves in the world. To the extent that such mention is necessary, advisable or proper in connection with the essential conclusions of the Court, we may not quarrel with such exploitation as the circumstances require or justify. We trust, however, that we may be pardoned the display of some feeling in discussing the propriety of the use of names, at the risk of possibly affecting honorable reputations, in connection with the characterization as breaches of duty and trust of circumstances which are not presented to the court for judicial action.

The learned Court further observes that :

“ Assuming that they (the Railway Company interests) were entitled to sympathy, it does not follow that they were entitled to protection. Their misfortune in nowise enlarged their rights as parties to the contract *or abated their duty as trustees of the Power Company.* As directors they were bound to subserve the interests of the Company, and *to hold its property for the common benefit of its creditors*, and they were not privileged to strip it of its meager remaining resources for the purpose of recouping their private losses. The adoption of any other view would necessarily be to recognize the rule of might, and to say for him to take who can.”

Animadverting upon these observations for a moment, it is pertinent to inquire why those who had advanced great sums to the Company and were arranging to advance other great sums, were not entitled to protection, if it could be obtained without prejudice to the rights of others, which is the only reasonable, logical and, therefore, just view which can be taken of the results of these transactions. As we will show hereafter, it was money taken from the earnings of the Company and the money received from the sales of the second mortgage bonds which had been put into the property and thereby enhanced the value of the lien securing the bonds of these Intervenor. To the extent that the money represented earnings, it was taken from other creditors and the stockholders; to the extent that it represented the proceeds of the

sale of the second mortgage bonds, it was a direct contribution by the holders of those bonds and by other creditors and stockholders, because such moneys might properly have been used to reimburse the Company and, therefore, other creditors and stockholders, for the amount of the earnings reinvested in the property. Accordingly, were we dealing with abstract equities, and were it necessary to enlarge upon that view for the purpose of maintaining the position which we assert, we might argue at length that it is highly inequitable that the Intervenor should be content to accept the vast increase in security resulting from such expenditures and close their ears to any consideration of the losses suffered by those who supplied the funds which made such increase possible. As we shall show hereafter, the Intervenor has everything for which they contracted ; for which reason, if the transactions in question may properly be said to be measures of protection on the part of those who had been and were continuing to invest large sums in what the Court considered to be an absolutely insolvent enterprise, upon what ethical or moral consideration is the finger of judicial scorn to be pointed at them and are they to be branded as fraudulent conspirators ?

We do not know to what the learned Court refers in stating that

“ Their misfortune in nowise enlarged their rights as parties to the contract.”

So far as we are aware, no one has claimed that the actions of the directors representing the Railway Company interests enlarged their rights as parties to any contract ; indeed, our position is that the acts of which complaint is made were specifically authorized by a written contract made openly and with respect to which a most exact and complete record was retained. It is the intervenors who are seeking to “ enlarge their rights as parties to the contract.” Their rights are exactly measured by an elaborate written instrument, the terms of which they concede the other parties thereto have rigidly performed, notwithstanding which they are here making grave charges against others who are claiming only the rights secured to them by their contract.

We do not suggest that the misfortunes of the Railway

Company interests "abated their duty as trustees of the Power Company." We assert only that, as trustees of the Power Company, they were not trustees for these Intervenor and that, accordingly, if that which was done deprived these Intervenor of nothing to which they were entitled by the terms of their contract, as between them and the officers of the Power Company, no occasion exists for considering any question of breach of trust or other duty. In discussing abstract questions of breach of trust and duty by the Railway Company interests, the fact must be kept in mind that the Railway Company owned practically all of the capital stock of the Power Company. As they also owned all of the second mortgage bonds, with the exception of \$166,000 thereof, they also owned practically all of the second mortgage lien on the property. This record does not disclose to what extent they also held the general unsecured obligations of the Company. Be that as it may, however, with the exception of the small outstanding stock interest, which does not complain, they themselves occupied the position of those for whom, in any sense, they may properly be said to have been trustees. Under such circumstances, if they stipulated that, if they are to advance an additional \$250,000 or any other sum to a company situated as was the Power Company at that time, they would only do so upon the condition that their security be increased and that, thereby, their position as creditors be improved, without detriment to the rights of other creditors, who is to gainsay their wish and who is to properly charge them with a breach of trust or with seeking to establish "the rule of might"?

Because it would too much prolong the discussion, we do not follow the somewhat overdrawn and almost fantastic observations of the Court with respect to the situation of the Bankers or of the Syndicate or of the Railway Company under the contract of September, 1911, because he repeats in that connection his tendency to discuss questions which, in this particular instance, he concedes to be immaterial, into which discussion we will not again be drawn.

In passing, however, it may not be amiss to remark that, if the Bankers or the Syndicate or the Railway Company are disappointed in their failure to reap the profits which they anticipated, is their position different in that regard from the

anticipations of the Intervenor or other predecessors in title to the bonds which they represent. With inconsiderable exceptions, those bonds were purchased at less than par. As shown by the tables of one of the brokers (pp. 324-333), he purchased many of his bonds with a bonus of thirty per cent. in stock and, with practically all which he sold, he delivered a bonus in stock running from ten to twenty-five per cent. As shown by the tables of another broker (pp. 333-340), a bonus of twenty-five per cent. in stock accompanied many of the bonds which he obtained, which bonus, from his statement of sales, he apparently retained. In varying degree, therefore, may we not paraphrase the statement of the Court with respect to the Railway Company interests and, applying it to such purchasers, also say that :

“ They bargained for the chance of profit in a speculative enterprise and they must have contemplated the risk of loss as well as the chance of gain.”

Whatever else may be said with respect to that statement, as applied to the Railway Company interests, are one's duties or obligations to third persons to be enlarged or his rights to protection diminished by the circumstance that his money is invested with the expectation of deriving therefrom a profit ?

Turning now particularly to the transaction of December, 1912, and to the consideration thereof by the learned trial Judge, he states that :

“ In consideration of the Railway Company's agreement to deliver to Bates & Rogers 100 shares of its own stock, *which was worthless*, and 50 shares of its preferred stock, *which was equally worthless*, and its obligation to pay the bonds, which, *because of its insolvency*, if for no other reason, was unenforceable, and hence practically of no value, the Power Company was made to agree that it would, upon demand of the Railway Company, deliver its first mortgage bonds up to \$500,000 face value * * * in exchange for consolidated bonds, which also were *without substantial value*.” (Italics ours.)

We will not here repeat our views upon the assumptions of insolvency and of the consequent worthlessness of the stock of the Railway Company and of the second mortgage bonds of the Power Company, except to again call attention to the fact that the only evidence in the record concerning the financial condition of the Railway Company, discloses a large equity for the stock, and to again express our surprise that, in view of such condition of the record, the Court should have reached such a conclusion. Evidently the Bates & Rogers Company attached value to the stock, and it is to be assumed that their reasons for so doing are justifiable; also that they attached value ~~of~~ the Railway Company's agreement to repurchase the consolidated bonds as, otherwise, they would not have required it. We also wish to recall the fact that Bates & Rogers claimed damages under their contract, up to the then present, amounting to more than \$85,000, and that the Power Company's engineer had advised it that to continue construction under that contract would increase the cost of the work to the extent of \$100,000. Accordingly, if the parties to the transaction considered that the stock of the Railway Company possessed substantial value and that the obligation of the Railway Company to purchase the consolidated bonds was worth \$20,000; if, by settling the Bates & Rogers claims, the Power Company was relieved of an obligation of \$85,000 and saved an additional expenditure of \$100,000 in connection with the contemplated work at the Ox Bow; and, assuming that the parties also considered, and justifiably so, that the second mortgage bonds of the Power Company did at that time possess substantial value, whatever else may be said of the transaction, can it be properly or fairly contended that the Power Company received no consideration therefor? And, though the consideration were meager, what badge of fraud attached to the transaction and who was defrauded?

The learned Court follows the statement last quoted with this :

" From the testimony and the surrounding circumstances, no doubt is left in my mind that the Power Company could have made settlement directly with Bates

& Rogers with its first mortgage bonds at a comparatively small discount, and that the devious course was adopted not upon their demand or for the interests of the Power Company or of any of said creditors, but for the sole purpose of furnishing a pretext for getting the first mortgage bonds out of the treasury of the Power Company and into the hands of the Railway Company and for the interests alone of those by whom the latter company was dominated."

As we consider the italicized portion of the statement one of the most surprising contained in the opinion of the learned Court, we have carefully searched the evidence for the purpose of determining what may be the basis thereof. The only reference thereto which we find is contained in the deposition of Mr. William Mainland (pp. 312-314). After detailing the circumstances of the meeting with Mr. Rogers, at which the matter was discussed, he continued :

" I said, ' Mr. Rogers, this matter is, as you know, in your brother's hands ; as I know it is in Mr. Wickes' hands, I don't want to butt in.' ' Well,' he says, ' whatever you say I will not consider it such and what I say is not official,' and we had a discussion then about the settlement.

" Q. During Mr. Wickes' negotiation, as I recall, he had suggested some bonds, more than twenty-five? A. More than twenty-five and no stock and I said, ' *What is the use of putting up so many bonds if you are going to redeem them anyway? No use tying that many additional bonds up.*' And Rogers and I discussed consolidated bonds and the first and refunding bonds and the stock proposition, the shares of stock, and he said, ' What about the first mortgage bonds?' He would consider taking those *as he still believed in the project*, etc. And I said, ' *I don't think you can get any of those, I don't believe so ; but it is possible that you might get the Railway to guarantee,*' which I had in fact discussed with Mr. Wickes before that, though I didn't tell Rogers then ; and before going away he said, ' If you can put

that trade through as it appears, I believe I will accept it; and of course he asked me what my judgment was on the Railway guaranty, *and I said to him I believed that it was all right," etc. Also that Rogers said that he would seriously consider "accepting the first mortgage bonds at the regular sale price."*

To what the learned Court referred as the "surrounding circumstances," we do not, of course, know. So far as direct evidence is concerned, however, can there be two opinions as to the reasonable and proper understanding of Mr. Mainland's statement and of its effect upon Mr. Rogers? In so many words, he testified that he told Mr. Rogers that he did not think that he could get the first mortgage bonds, and then suggested that he take the Railway Company's guaranty. There is no suggestion in the record anywhere that Mr. Mainland was one of the arch conspirators. Indeed, his testimony is much exploited by the Intervenors in support of their case. With this statement uncontradicted and unimpeached in any way, in all fairness, what can be the basis of the Court's statement that the course adopted was solely for the purpose of furnishing a pretext for getting the first mortgage bonds. As Mr. Mainland stated, he believed that the guaranty of the Railway Company was absolutely good, and evidently Mr. Rogers shared this belief. Evidently, also, what Mr. Rogers wished was the best security available for \$20,000. In view of the growing deficit in the Power Company's earnings, is it probable that he would have preferred the ~~Railway Company's~~ *it* first mortgage bonds at 80 rather than the absolute guaranty of what everyone then considered to be and what was an entirely solvent and responsible corporation?

And what is the justification for the Court's conclusion that Bates & Rogers would have accepted the first mortgage five per cent. bonds *(the company had no others)* "at a comparatively small discount"? Surely Mr. Rogers was in a position to know as much about the then condition of the Power Company as was the learned trial Court from the evidence in this record, which evidence discloses, among other things, that the five per cent. bonds had, when the Company's earnings were stated in a most attractive fashion, sold at 70, at which price \$30,000 of the \$50,000 then outstanding had been sold, and at 75, at which price others of such bonds had been sold (p. 453). No reason whatsoever suggests itself why Mr. Rogers would have been

content to take those bonds at a price to net the Company 70. What he wished was \$20,000 ; and he considered, and, undoubtedly, everyone else concerned in the transaction considered, that the guaranty of the Railway Company assured him that sum much more certainly than the first mortgage five per cent. bonds at any price at which it may fairly be considered that he would have taken them. Again we are compelled to say that it appears to us that the mind of the learned trial Court has been affected by some circumstance or circumstances other than those in this record and that, for the purpose of reaching his conclusions, he has indulged assumptions utterly unjustified by any of the evidence.

We repeat then, what is the evidence of fraud which impugns these transactions ? This inquiry cannot be answered by asserting that the Railway Company interests committed a breach of trust toward other second mortgage bondholders or that they failed in their duty to the Power Company or to its stockholders. As we have seen, in behalf of creditors, the transaction can be condemned only in the event that it was done with *intent* to hinder, delay or defraud these particular creditors. It may have been unwise, it may have been unjustified as between the Company and its stockholders or as between the Railway and other second mortgage bondholders, but was its intent fraudulent ; that is, was the motive bad pure and simple ? As we have seen from quotations previously made from *Bigelow on Fraud*, that learned author points out that, if the transactions be accompanied by present consideration, it is difficult to conclude that a fraudulent intent existed. It is a truism that fraud will not be presumed, but must be shown and proved ; and that, although transactions may be suspicious or be such that a particular individual may condemn them, unless circumstances are shown from which the deliberate desire and intent to defraud appear, they are not within the Statute of Elizabeth.

Under the discussion of the weight and sufficiency of evidence in actions to set aside transactions on the ground of fraud, it is said :

“ Fraud, however, must be proved *as an affirmative fact*, and the proof must be of such a positive and definite character as to convince the mind of the

court, *for it is never presumed*, and if the acts shown all comport as well with honesty as with fraud, the transaction should be upheld " (20 *Cyc.*, 785).

Again :

"The mere fact that the transaction in question is prejudicial to creditors does not defeat it. The evidence must be of such character and degree as will justify reasonable men in arriving at a conclusion that fraud existed ; and evidence that merely casts a suspicion on the transaction is not sufficient to vitiate it " (20 *Cyc.*, 791).

"The creditors of a party defrauded have no right, even though the fraud has the effect of diminishing his means of paying them, to look into such fraud or unravel it. It is for him and him alone to do so, and *if he chooses to acquiesce in the fraud, or suffers himself to be concluded of his right to investigate or undo it, his creditors must be content to abide by the legal rights remaining in him.* There is a manifest distinction between a fraud upon the debtor and a fraud upon creditors. In the one case the debtor is the victim and guilty of no wrong, while in the other he is himself either in fact or in law the perpetrator of a fraud. In the latter case the creditors who seek to avoid a sale or transfer do not represent the debtor, but exercise rights paramount to his. In the former case *the remedy belongs to the debtor alone, and they cannot interfere when they are not in contemplation of the author of the wrong, and are only affected consequentially.*"

Bump on Fraudulent Conveyances, 4th Ed., Sec. 20.

"A fraud upon creditors consists in the intention to prevent them from recovering their just debts, by an act which withdraws the property of the debtor from their reach."

Id., Sec. 21.

In *Foster v. M' Alester*, 114 Fed. 145, the plaintiffs, having a chattel mortgage on two stocks of merchandise in Arkansas,

permitted the mortgagor to remove the goods to Indian Territory and transfer them to Terrell & Co., a firm of which he became a member, under an agreement that such firm would assume plaintiffs' debt and give them a mortgage on this stock at any time requested. The Arkansas mortgage was not recorded in Indian Territory. The defendants wrote plaintiffs inquiring about the financial condition of Terrell & Co. and its credit, to which plaintiffs replied that they considered its credit good, making no mention of the Arkansas mortgage or of the agreement for the Indian Territory mortgage. The evidence showed that, in fact, Terrell & Company's credit was not good. After making such inquiry, defendant sold goods to Terrell & Company. Thereafter, plaintiffs requested and obtained the mortgage which Terrell & Company had agreed to give them ; took possession thereunder, and, in conjunction with the mortgagors, were selling the merchandise in the usual course of business, applying the daily proceeds to the mortgage debt. The defendants attached the merchandise on the claims resulting from the goods sold Terrell & Company by them after making the inquiry of plaintiffs, and the goods were sold pursuant to the levy under the attachment. Plaintiffs brought the action to recover the value of the goods sold under the attachment. Defendant set up that the transactions between Terrell & Company and plaintiffs were, as to the defendants, fraudulent. The trial judge charged the jury that the following were badges of fraud on the part of the plaintiff :

1. The failure to record the Arkansas mortgage ;
2. The failure of the plaintiffs to mention the Arkansas mortgage and the agreement for the Indian Territory mortgage when the defendants inquired as to the financial condition of Terrell & Company ;

Held error ; that the burden of proving fraud was upon the defendants, which burden they had not sustained. Among other things, the Circuit Court of Appeals for the Eighth Circuit said :

“ An act which in itself is lawful and innocent is never presumed to be fraudulent, and the burden rests on the party assailing it as fraudulent to prove it.

* * * The law will not deduce fraud from any num-

ber of lawful and innocent acts. One who seeks to attach a fraudulent character to such acts must go further, and show *they were in fact done with a fraudulent intent and for a fraudulent purpose.* * * * Fraud cannot be inferred either by the Court or jury from acts legal in themselves, and consistent with an honest purpose."

In *National State Bank v. Wheeler*, 40 N. Y. App. Div., 563, it was held that a conclusion of law that the *effect* of a voluntary conveyance was to hinder, delay and defraud creditors could not be sustained in the absence of a *finding of fact* that it was made with *intent* to hinder, delay and defraud creditors. The action was brought by a judgment-creditor with execution returned unsatisfied, but the Court said :

"There must have been an intent in making the conveyance to hinder, delay and defraud the creditors. *The question of intent is one of fact, and must be both alleged, proved and found to warrant the judgment.*"

In view of the language last quoted, it is pertinent to again point out to the Court that the Intervenor's bill makes no charge that the transactions with respect to the 718 bonds were had with intent to hinder, delay or defraud them or any other creditors ; that, accordingly, the respondents were not called upon to meet any such issue and did not seek to meet it upon the trial. If, therefore, this decree is to be sustained upon the ground that they were had with intent to hinder, delay and defraud creditors, an issue will have been determined which was not presented by the pleadings and notice of intention to present which was not given the respondents.

In *Chick v. Fuller*, 114 Fed., 22 (Circuit Court of Appeals, 7th Circuit) (Petition for writ of *certiorari* denied, 187 U. S., 640), a mortgage was given by a corporation to secure bonds to pay its indebtedness to two banks, in which directors and stockholders of the corporation were also stockholders. The corporation was in fact insolvent at the time, but that circumstance resulted from the dishonesty of its president and was not

known to the directors and stockholders who were interested in both companies. Held that the mortgage was valid as against judgment-creditors, because it was given by a going concern in the expectation that its business would be continued.

The last-mentioned case is cited not as directly in point under the facts here, but as disclosing that the effect of a given transaction will not be held to constitute fraud upon creditors and that it is not the *fact* of insolvency which entitles creditors to a standing to complain of a given transaction, but the understanding of those participating therein as to whether or not the company's business is to be continued.

"A fraud such as will authorize a creditor to set aside a conveyance made by his debtor must be one directed by the debtor against his creditors, *and not one practiced by third parties against the debtor. If a debtor has been overreached in a transaction, he may avoid it himself, but a creditor of his has no standing to do so.*"

14 *Am. & Eng. Enc. of Law*, 2d Ed., 266.

The statement last quoted expresses the fundamental proposition which we contend to be involved in determining if the Intervenor, as creditors, have, as stated by the learned trial court, any standing to attack the transactions upon the ground of fraud. That is to say, in order to give them any standing for that purpose, it is not sufficient for them to show that the directors of the Power Company intended to improve their position at the expense of the Power Company or of its stockholders, but that, in arranging the transactions, their well-defined purpose was to defraud these Intervenor; and in determining that point, as we have seen, it is not sufficient that the transactions did, as a matter of fact, affect the position or security of these creditors. That the record contains not a scintilla of evidence justifying any such conclusion, we most earnestly and sincerely believe and assert.

In *Damarin v. Huron Iron Co.*, 47 Ohio St., 581, the action was brought by a creditor to set aside mortgages given by the defendant to certain banks, including one in which two of the directors were also directors of the mort-

gagor. The mortgages were given to secure a pre-existing indebtedness, and the Court found, as a fact, that, at the time "though the corporation was insolvent *to the knowledge of its officers*, its general commercial credit remained good, and that it was in the control of its property, actively prosecuting its business, and expected to continue to do so as before." In holding that none of the mortgages could be set aside, the Court said:

"The right of a company, though embarrassed, to continue its business and to retrieve its fortunes, if possible, must be conceded to it as well as to natural persons, and *this right necessarily carries with it the power to obtain an extension of credit by giving a mortgage upon its property to such of its creditors as are unwilling to give further time, unless so secured*. When this power is fairly and honestly exercised, with no purpose at the time of immediately abandoning business or making an assignment, the validity of a security so obtained cannot well be questioned."

Are not the observations of the Court in the case last mentioned especially pertinent here? The only evidence in the record that any of the directors of the Company considered at the time the possibility that the Power Company's business might not be continued is the remark on the part of Mr. Watson to the effect that, in a general way, he had some doubt as to its ability to go on and that of Mr. Wiggin to the effect that he understood that, unless the Company obtained the \$250,000, it would fail. Instead of, as in the last mentioned case, being limited to the acquisition of security for an existing indebtedness, as the result of obtaining which the creditor withheld proceedings against the Company, the transactions in the case at bar enabled the corporation to obtain funds with which to continue its business unhampered. Since the question of fraud is unimportant if the Company were not insolvent in the sense that its business was to be abandoned and since the record does not contain a scintilla of evidence to the effect that any one at that time intended otherwise than that the moneys then supplied would enable the Company to continue its business

at least for a period of six or seven months, in the last analysis, the question of fraud becomes unimportant; or, to put it another way, so long as the parties intended by what they did to enable the Company to continue its business, the transactions cannot be said to have been had for the purpose and with the intent of defrauding these Intervenor.

The case last mentioned was favorably commented upon by this Court in *Coler v. Allen*, 114 Fed., 609, where, among other things, this Court held that:

“ A corporation, so long as it is a going concern and engaged in the active prosecution of its business, may lawfully execute a mortgage on its property, if done in good faith, to secure an extension of a prior indebtedness and further advances to be used in its business, *although it is at the time financially embarrassed, or even insolvent*; ” and such mortgage could not be set aside at the suit of a judgment-creditor of the corporation.

Speaking through GILBERT, J., among others things, the Court said :

“ The courts of the United States in dealing with the question of the right of an insolvent corporation to prefer a creditor have in all cases, except where the matter is the subject of statutory regulation, held that the corporation had the same right and authority to make such preference that an individual would have.
* * *

“ This is not the ordinary case of an insolvent corporation selecting one creditor to whom it owed an antecedent debt and securing the same to the exclusion of others. The mortgage in the case at bar was taken not only to secure a prior indebtedness, but a large proportion of the amount secured was a new consideration, money to be advanced for the use of the corporation in its business to the amount of \$10,000. The corporation had not to any extent closed its business, *nor is it alleged that it was embarrassed further than that it was insolvent*. Its business was not brought to a close until several months later.

* * * The mortgage in this instance, according to the pleadings, furnished the corporation funds for its use in the course of its business. His mortgage was taken for money already advanced and for money thereafter to be advanced. It is not alleged that he had any knowledge of the insolvency of the corporation or that the officers of the latter *intended to give him a preference or to hinder or delay other creditors.* The corporation was a going concern. At the time of giving the mortgage and receiving the advances it was apparently preparing for the annual run of salmon which might be expected to furnish it the means of discharging or reducing its liabilities. * * * We think * * * that the appellant has shown no grounds sufficient to justify a decree setting aside the mortgage."

Applying to the case at bar the views there expressed, can it be justly contended that the extremest view of the transactions in question can reasonably be other than that, in consideration of the Railway Company or the syndicate or the Bankers supplying the Power Company with funds sufficient to enable it to continue its plan of improvements and work of construction during the following six months, the Power Company agreed, assuming the worthlessness of the second mortgage bonds, to secure to some extent the moneys theretofore borrowed or, assuming only that the first mortgage five per cent. bonds were then considered to be more valuable than the second mortgage bonds, to increase such security; and if that was the substance of the transactions, regardless of their form, are we not brought directly within the scope of the well-settled law as expressed by this court in the case last mentioned? The only possible difference in the facts is that, the Railway Company directors here who may be compared to the mortgagee there, did know or were chargeable with knowledge of the condition of the Power Company, whereas in the Coler case, it was not alleged that the mortgagee had such knowledge. That however, was not the determining factor, which was and is and should be, whether or not the security was taken or the money advanced in good with faith the intent and expectation of assisting the Company to continue its business. The latter was the

situation in the Damerin case, *supra*, which was cited with approval by this Court in the Coler case; that is, in the Damerin case, the Court expressly found that "the corporation was insolvent to the knowledge of its officers," and one of the mortgages was given to a bank, two of the directors of which were also directors of the mortgagor; and there no new money was advanced and the only consideration given was that of refraining from proceeding against the Company in return for obtaining the security.

Clark and Marshall on Private Corporations, § 777b, say:

"The doctrine which disqualifies directors of a corporation from binding it by a contract or conveyance with or to themselves, or in which they have an interest adverse to that of the corporation, does not, of itself, give the creditors of the corporation the right to attack such a transaction in any case in *which the corporation or its stockholders could attack it*. The transaction, if the corporation was solvent at the time, is not void, but merely voidable at the option of the corporation or its stockholders. Creditors cannot attack it merely on the ground of the fiduciary relation existing between the corporation and the directors, regardless of the fairness or unfairness of the transaction, but, in order that they may impeach it they must show that the corporation was insolvent at the time of the transaction, or that it was entered into with intent to hinder, delay, or defraud them."

And at § 787a, they say,

"So long as a corporation is solvent, it may borrow money from or otherwise contract with an officer or director, and may pay him, or mortgage or pledge property to secure him, just as it may pay or secure any other creditor, and, if it afterwards becomes insolvent, the conveyance, mortgage, or pledge will be valid as against other creditors, although the result may be to leave them unpaid."

As we hope that we have shown, the question is not necessarily affected by the fact that at a shorter or longer time in

the future, as the case may be, the particular corporation confesses insolvency, as ultimately occurred in all of the cases to which we have referred. The receiver of the Power Company was appointed in December, 1913. The Company, however, defaulted on its first mortgage bonds on April 1, 1913, somewhat more than six months after the September transaction and somewhat more than three months after the December transaction. Confining our statement to the December transaction, unexplained, it might perhaps fairly be argued that, at the end of December, 1912, the directors of the Power Company should have had some notion as to whether or not the Company's interest would be provided on April 1st. Undoubtedly, they did have some information on the subject, and, beyond question, at that time there was every intention of continuing to supply the Company with funds.

The record discloses, however, that, intermediate the transaction in December and the 1st of April, a new and disastrous condition in the power market in Boise had come to pass (pp. 431, 432). A company known as the Beaver River Power Company had, in December, commenced actually to serve current in the City of Boise. Prior to that time, the base rate of the Power Company was fifteen cents per kilowatt hour. The rates under which the Beaver River Company solicited contracts were nine cents per kilowatt hour, a decrease of about 40%. Although the facts showing the effect of this competition upon the earnings of the Power Company and the necessity for that Company, in self-protection, to cut its rates to meet the competition were not gone into at the trial, because the question of the Power Company's insolvency or its effect were not presented by the pleadings, in view of the deficit shown for the year ending December 31, 1912, the Court will not be required to indulge any violent assumptions for the purpose of concluding what was the situation at the end of March, 1913. Not only must the Power Company then have lost many of its customers but its proportionate income from those retained must have been very largely reduced. The intentions of its friends in December, 1912, with respect to supplying it with funds to continue its business cannot, therefore, in any extent or to any degree, be made the measure of their intentions, as

disclosed by their acts, three months later. That is not all, however. Obviously, the Power Company was maintained as a going concern until December, 1913, when, by reason of the litigations precipitated by these Intervenor, all parties in interest ultimately consented to the appointment of a receiver. Just as obviously, the Company could not have maintained itself during that period unless it had received further advances of money. Indeed, the opinion and decree herein show that it did receive further advances of money, as security for which the Railway Company interests did not, *as they might have done*, exchange the remaining 107 first mortgage five per cent. bonds for other second mortgage bonds, but received them as security only and did not, as they might readily have done, call the new loans and sell the security, which, after the default in the payment of interest on those bonds, would probably have brought little or nothing and could therefore, have been taken over by the Railway Company at small cost. In other words, despite the inability of the Power Company to pay the interest on its first mortgage bonds, despite its inability to pay the interest on its second mortgage bonds, all of which, except \$166,000, were held by the Railway Company, the Power Company was maintained as a going concern during a period of nine months succeeding the default on the first mortgage bonds and a period of eight months succeeding the default on the second mortgage bonds and was, ultimately, placed in the hands of a receiver, not by those who had obtained the alleged benefits of the transactions of which complaint is here made, *but at the instance of these Intervenor.*

Eliminating the fervid rhetoric which constitutes a large part of the Intervenor's Bill, their real reason for coming into the foreclosure suit and precipitating these contests, was that they considered that the plan of reorganization, which had been promulgated by the New York Committee, was unfair to them as the holders of the Power Company's first mortgage bonds. Were we permitted to indulge in prophesy, it would be interesting to speculate as to the ultimate realizations of their bondholders as compared to the plan which the New York Committee formulated for the purpose of seeking to protect them. We have no intention of going into a discussion of

the merits of the plan. As, however, copies of some of the papers connected with it are attached to the Intervenor's Bill we may, perhaps, be justified in pointing out that the plan contained in Exhibit B (pp. 80-89), was not that which was in process of attempted execution, when the Intervenor's filed their bill, but that which is set forth in Exhibit C to the Bill (pp. 92-95). Personally, in view of the expressions contained in the opinion of the learned trial court regarding the utter and hopeless insolvency of the Power Company in September and December, 1912, we should be greatly pleased if this court will read the two plans for such light and such inferences as may be deduced therefrom bearing upon the intent of the Railway Company interests at the time of the transactions hereunder attacked. It is believed that, to the extent that the facts are contained in this record, it will be found that the circulars mentioned exhibit to those interested in the Power Company's property an absolutely truthful and straight-forward statement of the facts of the situation at the end of March, 1913, which the bondholders should have considered for the purpose of adequately determining the best course to adopt toward the protection of their own interests. Among other things, it will be observed, that the Railway Company was proposing to cancel this \$718,000 of the Power Company's first mortgage five per cent. bonds; that the first proposal of the New York Committee was that the other Power Company first mortgage bonds be exchanged for an adjustment mortgage bond of equivalent amount and that, in addition thereto, the Railway Company issue to each bondholder twenty-five per cent. face amount of its common stock for each \$1,000 bond. Not only this, but the Railway Company offered to cancel all of its \$854,000 of the Power Company's second mortgage bonds, all of the \$250,000 of notes which represented the moneys advanced under the transactions here involved and also to surrender the \$500,000 of second mortgage bonds held as security therefor. Not only this but, as the circular states, "as further consideration for the transfer of the property of the Oregon Company, *the Railway Company will, as the same shall be required, furnish for the purposes of the properties now held by the Oregon Company additional capital to the extent of \$1,250,000*" (pp. 84 and 85). The circular further states that,

as appears from the figures given, if the transaction were consummated as proposed, the Power Company's properties would have cost the Railway Company \$4,316,000 face value in bonds and notes.

In addition to setting forth all of the figures which might properly enable the bondholders of the Power Company to determine their best interests, the circular set forth clearly and in detail all of the properties owned by the Railway Company, and the securities which were outstanding against them (pp. 85-87). The circular also proposed that the adjustment bonds should only receive interest as earned, and estimated, on the basis of then current earnings and "under the present severe competitive and cut-rate conditions existing in Boise and the neighborhood," that the adjustment bonds would show interest of approximately four per cent. during 1913, five per cent. during 1914 and six per cent. during 1915, whereas, under the same conditions, it was estimated that the earnings for the first and refunding bonds then held by the Power Company bondholders (those held by the Intervenor here), would be sufficient only to pay at the rate of 2.4 per cent. during 1913, two and 2.8 per cent. during 1914 and 3.6 per cent. during the year 1915 (p. 87).

The circular also pointed out that the bondholders must consider "that, unless the work ^{at} of the Ox Bow is completed with reasonable diligence, the Company's rights there will abate and its entire investment therein will be lost," which investment at that time represented bonds to the aggregate amount of considerably more than \$2,000,000 (p. 87).

The foregoing statement was followed by this :

"As it is apparent that some definite course of procedure must be adopted at once, the only alternative to the plan proposed *would seem to be for the bondholders to take over the property and themselves finance its development*" (p. 88).

In addition to the foregoing, the circular also informed bondholders that the Committee would arrange to procure funds with which to pay the April 1st coupons from the bonds of those who assented to the plan "and that depositors will

not be called upon to bear any part of the expense of carrying out said plan " (p. 88).

In view of these provisions, in all fairness and in an appeal to a court of conscience, particularly in face of the views expressed by the learned trial court with respect to the value of the Power Company's properties, will any sane and reasonable man be able to say that those controlling the Railway Company had any intent, purpose, desire or design other than to do what was possible to maintain the Power Company as a going concern? Would they, otherwise, have consented to the cancellation of securities and notes aggregating \$1,882,000, all of the security held for their notes, and have obligated themselves to supply additional funds *for the development of the Power Company's properties* to the extent of \$1,250,000, with any view to wrecking the Company or doing otherwise than improving its situation and increasing its value? Had the plan been made operative, if the estimates therein made were justified, instead of being barren of interest on their investment since April, 1913, the bondholders would have been receiving a small return which, by this time, if the then earnings had continued and increased as expected, would have amounted to the original rate. Whatever other conclusion may be drawn from the matters last herein mentioned, can they be said to be significant of an intention in September and December, 1912, of terminating the business of the Power Company and of making away with such of the wreckage as was possible?

The Intervenor may respond to these suggestions by the statement that, as subsequent events disclosed, the Railway Company was not financially able to carry out the plan and to advance the additional moneys proposed. The rejoinder is that the financial ability of a Company of that character is measured by its credit. That credit was maintained until December, 1913, and until after the actions of the Intervenor had forced the appointment of a receiver of the Power Company. There is no suggestion that those interested in the Railway Company were not able to carry out their plan for the consolidation of the two companies and to supply the Power Company with the additional funds necessary to develop its potential resources; and the fact that they sustained the Power Company during a period of nine months following the default

upon its first mortgage bonds can, we most earnestly submit, be held to be significant only of a most sincere and determined resolution to do everything possible to prevent those now represented by these Intervenor, and the two properties themselves, from getting into the position in which they now find themselves.

We also earnestly hope that the Court may read Exhibit C of the intervenors' Bill, which is a circular to the holders of both classes of the Company's bonds and to its stockholders, in which is set forth a modified plan of reorganization. The circular mentions that, since sending the previous circular (Exhibit B),

"the Committee has received from various parties in interest and considered a great variety of suggestions and proposals. During the past two weeks, at the invitation of the Committee, its representatives and those of other parties in interest, including those who have sold the Idaho-Oregon Company's bonds, have conferred almost daily regarding the matter; and, in connection with their consideration thereof, all desired facts bearing upon the situation have been furnished from the records of the Idaho-Oregon Company and of the Railway Company. As a result of such conferences another plan has been prepared, a copy of which is herewith enclosed. As you will observe, the plan now includes the holders of the Consolidated First and Refunding Mortgage 6% Bonds, as well as all preferred and common stockholders of the Idaho-Oregon Company" (p. 92).

The circular continues (p. 93) :

"Instead, as originally proposed, of an adjustment bond paying interest only as earned, the Railway Company will create a second mortgage covering all of its property, rights and franchises and all of those now held by the Idaho-Oregon Company, to secure bonds which will be issued in two series, to be designated respectively 'A' and 'B'.

"Series A bonds will be issued to the amount of

\$3,212,000 and will bear interest at the fixed rate of 2% during the first, 3% during the second, 4% during the third year and 5% thereafter. *In addition, they are to be convertible into first mortgage bonds of the Railway Company, par for par, after five years, in amounts of not less than \$500,000, under the conditions more particularly set forth in the said amended plan."*

It will be recalled that \$3,212,000 was the aggregate of all of the first mortgage bonds of the Power Company outstanding, including the 718. Thus, instead of an adjustment bond paying interest as earned, those represented by the Intervenorers were offered a bond with a definite lien and fixed interest rate which, after five years, would be convertible into first mortgage bonds (pp. 93 and (3) 94).

It will also be observed from the modified plan that excluding the \$718,000 of bonds, the securities held by the Railway Company were to be made subordinate to those representing the bonds held by the Intervenorers and other Power Company first mortgage bondholders, and that Series B bonds in the proposed consolidated company were to be accepted therefor (pp. 93 and (5) 94); also that all of the outstanding second mortgage Power Company bonds were to be exchanged for Series B bonds ((4), p. 94). The Series B bonds were to be entitled to "no interest during the first three years after their issue unless and to the extent that the same shall be earned;" and that, in such event, the interest was to be limited to 5%.

Again we ask, do these suggestions indicate a desire or intention on the part of the Railway Company interests to throttle or defraud those then holding the securities of the Power Company? Do they indicate any campaign based upon the right of might and do they suggest any invitation for him to take who can? To be sure, the moneys then invested in the Railway Company's properties were to be secured by a prior lien on the combined properties, but those who had invested such money were agreeing to invest further large sums for the benefit of the properties of the Power Company which, necessarily, would have greatly enhanced their value and increased their capacity. To the extent that they also had invested in the Power Company, not only did they not suggest

any preference, but that they subordinate their obligations to those of others who had invested in the Power Company's securities. At that time, with the severe competition existing in Boise, it had become obvious that, without the strongest possible assistance, the business of the Power Company was doomed. Do not the facts, in view of such circumstances, justify the assertion that the Railway Company interests were actuated by a desire to do everything possible for the Power Company's bondholders, although they had not been responsible for the sale of one dollar of its securities? Not only did they offer to provide the means of strengthening the properties of both companies, but their plan provided that at the end of five years, assuming of course a proper increase in the earnings of the Company, the investment of the Power Company's first mortgage bondholders, other than their own, should be placed upon a par with their investment in the Railway Company.

In the light of subsequent events, perhaps, the Railway Company interests should express their gratitude to the Interveners because their machinations rendered their plan of reorganization impossible of consummation! It would seem, however, to be a matter of grave doubt if they are also entitled to the gratitude of those whom they are assuming to represent. Be that as it may, we confidently assert that, so far as they are disclosed by this record, the entire sequence of events following the transactions of September and December, 1912, fails to indicate any intention, desire or expectation on the part of the Railway Company interests that the Power Company would cease to be a going concern; that any occasion would exist for collecting the wreckage from its destruction, and that such terms are justified in connection with the present situation of the affairs of the two companies only because of the destructive activities of these Interveners.

We will close this portion of the discussion by reference to *Wilmott v. London Celluloid Company*, Law Reports, 34 Chancery Division, 147, which is most instructive. There, B. and H., who were directors of the Company, B. being Managing Director, had advanced it moneys from time to time. In September, 1884, the Company's plant was burned and the Insurance Company had admitted liability to pay £3,000 on

account of the loss. Two directors constituting a quorum, B. and H. immediately held a directors' meeting and adopted resolutions authorizing actions to be begun at once against the Company in their behalf for the moneys which they had loaned and authorizing and instructing solicitors to immediately appear for the Company and consent in its behalf to judgment. The actions were brought, judgment taken immediately by consent, garnishee orders served on the Insurance Company, the £3,000 obtained and applied upon the debts due from the Company to themselves. It also appears that, although the Company's business was continuing, it was at the time, insolvent.

The Company had issued mortgage debentures, which were a first charge upon all of its property, both present and future, except that "the company might in the course of its business deal with the property charged in such manner as the company might think fit." In December, 1884, the debenture holders brought an action against the Company and against B. and H. for the repayment of the £3,000 and for other relief. Two days thereafter, an insolvency petition was presented and a winding up order was shortly made. Held, that there was no fraudulent preference to B. and H. and that the transaction complained of, *being in fact the payment of a just debt while the Company was still a going concern, was a dealing by the Company in the course of business within the condition of the debentures.*

In the course of the argument, counsel for the debenture holders, said :

"It cannot, perhaps, be said that the Company was doing no business at all ; but all its machinery, and the greater part of its stock, had been destroyed by fire, its landlord was pressing for rent, the company was *in extremis*, and practically was not a going concern. And inasmuch as the effect of this transaction was not to enable the company to continue its business but to bring the business to an absolute standstill, it cannot be considered as one in the course of business, which must mean in the course of the ordinary business of the company as a going concern."

In considering the matter, COTTON, L. J., *inter alia*, said :

“ It is unnecessary to give any opinion as to the conduct of the defendants in this matter ; the question is, whether they were acting in the course of the business of the Company. * * * The Company, of course, means the directors, and the resolution complained of was passed at a meeting of directors at which a proper quorum was present * * *. The plaintiff has not made out that the business of the Company had stopped at the date of this transaction, *although undoubtedly the Company was at that time insolvent* ; and I think we must hold that until the presentation of the winding-up petition the business of the Company was going on. That being so, this dealing must be considered to have taken place in the course of the business of the Company, and therefore, * * * the plaintiff's claim cannot succeed.”

Sir J. HANAN, among other things, said :

“ No doubt, considerable prejudice has arisen as to this transaction from the circumstance that the two directors who acted in the matter were interested parties. But considering the transaction without prejudice, it appears to me that the question is whether or not the payment of a legitimate and just debt is in the course of the business of the Company, and, so put, the question answers itself.”

FRY, L. J., expressed the same view.

Assuming that, if the transactions here under review can be said to have taken place in connection with the usual course of the transaction of the Power Company's business, they cannot be held fraudulent as to the Interveners, will any unprejudiced mind conclude that the stipulation of the Railway Company for better security in connection with the agreement to make an additional loan of \$250,000 is, morally or equitably, more reprehensible than the actions of the two directors in the case last quoted, who alone constituted the meeting of the Board at which arrangements were made whereby their per-

sonal claims for monies *theretofore* advanced to the Company were to be paid, notwithstanding that their Company was in fact insolvent and, by the destruction of its plant, had lost its capacity, for the time being at least, to carry forward its business and to seek to recoup its losses? If any dealings between a corporation and its directors can ever be said to give creditors, who were not thereby intended to be defrauded, any right of action, it would seem that a more flagrant case can hardly be imagined. As one of the judges there said, because the directors while representing the corporation, had dealt with themselves, "No doubt considerable prejudice has arisen as to this transaction." Such prejudice will not, however, affect this Court, which is wholly removed from the atmosphere of the subsequent difficulties of both of the Companies involved, and we have little doubt but that, as the Court in the Willmott case said, when they are considered without prejudice, the conclusion here will be the same.

V.

The rights of the Intervenor are confined to their contract, which has not been violated.

If we are correct in the conclusions expressed in the foregoing portions of the discussion, the decree below must be reversed because, (a) within the rule entitling creditors to attack corporate transactions, the record either discloses that the Power Company was wholly solvent, or, that issue not having been presented by the pleadings, an opportunity to meet it should be afforded the respondents; that (b) if we are in error in those contentions, the record negatives any conclusion of an intent to defraud these creditors, which is the only character of fraud of which they may complain, and (c) that the issue of an intent to defraud the Intervenor is not presented by the pleadings and is not, therefore, before the Court.

The brief in behalf of the Receiver of the Railway Company points out that transactions between a corporation and its directors are not void but only voidable at the instance of some one entitled to act in behalf of the corporation. Strictly speaking, that question is not presented here because, clearly, as creditors, the Intervenorers have no right whatsoever to act in the Company's behalf. *The question is not if the Company was defrauded, but have these Intervenorers been defrauded* which, as we have attempted to show, is a wholly different thing. The burden of proving the fraud is upon the Intervenorers and cannot be shifted by the easy method of considering the case as though the respondents were presenting their bonds on distribution and requesting payment thereof, as the learned trial Court seemed to consider. Thus the opinion states :

“ The Railway Company is in reality the actor. It is not content with what it was thus wrongfully able to acquire through its control of the Power Company. It is dependent upon, and is here invoking, the assistance of a court of equity to make actually available to it the fruits of its wrong-doing * * *. It is asking the Court to aid it in enforcing contracts the possession of which it obtained in a manner violative of sound principles of public policy and of good morals, and in that view it is quite unimportant whether the intervenors would have any standing as plaintiffs in an independent suit. Regardless of who objects or whether any one objects, a Court will not knowingly assist a party to realize the fruits of his wrong-doing, and under the rule the Railway Company must be denied the relief which it seeks.”

Notwithstanding that the apparent indignation of the Court has carried it to such lengths, we respectfully submit that such views should not override the requirements of the rules of evidence and other rules of orderly court procedure. Had this controversy actually arisen after the sale of the property, the bonds held by the Railway Company, which are payable to bearer, would have been presented in due course to the Master, which presentation would have raised a presumption

in favor of their participation in the distribution of the proceeds of this sale. If any one should object to such participation, it would be necessary for him to justify the objection and, if it were based upon the ground that the bonds had been fraudulently obtained, the burden would have been upon the objector to make proof of his allegations. The changed and imaginary situation upon which the Court lays hold for the purpose of justifying its conclusions cannot, in the last analysis, be made to deprive the Railway Company of any of its rights, nor can it change any fundamental principles of law. Accordingly, regardless of the actual or imagined conditions under which the question arises, unless the Intervenor has made clear proof of the intent of the Railway Company interests to defraud them and unless that issue was tendered by their Bill, the decree is wrong, fundamentally and grievously wrong; and it cannot be made right by any shifting or assumed or pretended changing of the situation.

Without again citing or again quoting authorities to which we have heretofore referred, it is obvious that a creditor's claim against a corporation must, like every other legal claim, be grounded upon contract or tort. The claims of the Railway Company here are based upon contracts, which, in the case of that of September, 1912, has been fully executed by both parties thereto, and, in the case of that of December, 1912, has been fully executed by the Railway Company and has been executed by the Power Company to the extent of exchanging 218 of the first mortgage 5 per cent. bonds of the 500 which it thereby agreed to exchange. Accordingly, under the conditions assumed by the Court, these 718 bonds have been presented to the Master claiming their distributive share in the proceeds of the sale. The Intervenor objects and as a ground of objection asserts that the Railway Company should not participate in the proceeds of the sale because it acquired the bonds by taking advantage of its influence over the Power Company. The Railway Company responds that the assertion is untrue, but, whether true or not, it is not the affair of the Intervenor, whose bonds were issued under the terms of the mortgage of April 1, 1907, each of which states that each bond is one of a series "of like form, tenor and effect" amounting in the aggregate to \$7,000,000, the payment of all of which, with interest, "is equally and ratably,

and without preference of one bond over another, secured by a trust deed or mortgage", etc., "which trust deed is made a part hereof" (pp. 383 and 384); that, after describing the property, the mortgage or deed of trust provides that the conveyance is

"in trust, however, for the equal and proportionate benefit and security of all present and *future* holders of the bonds and coupons issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and coupons, when payable, * * * without preference, priority or distinction, as to lien or otherwise, of any one bond over any other bond by reason of priority in the issue or negotiation thereof, so that each and every bond issued and to be issued as aforesaid shall have the same right, lien and privilege under this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been made, executed, delivered and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof, without regard to the date of actual issue, sale or disposition of such bonds, and as though upon the day of such date all of said bonds had been actually issued, sold and delivered to, and were in the hands of innocent holders for value" (p. 386).

The Railway Company further shows that the mortgage also provides that the bonds issued thereunder shall not become obligatory until they shall have been authenticated by the certificate of the Trustee endorsed thereon. Other provisions follow, referring to the use to be made of bonds of specified amounts (pp. 387 to 390). Of such bonds, Nos. 2501 to 3050 inclusive, were set apart for the purpose of paying off and retiring underlying bonds covering the properties of the Electric Power Company, Ltd., and the Boise-Payette River Electric Power Company. Of these, the Railway Company

holds \$24,000, face value, being Nos. 2501 to 2514, inclusive, and Nos. 2525 to 2534, inclusive (p. 397).

The mortgage further provides that the remainder of the bonds, being Nos. 3051 to 7000, inclusive, shall be held by the Trustee until certified and delivered to the Company from time to time for (a) the purchase or acquisition of other properties, and (b) for the payment of outstanding indebtedness secured by lien on any properties thus purchased, and (c) "for 90% of such amounts as may be after this date actually expended by the said Company in additions, improvements, extensions, enlargements, equipments or betterments to any of its plants or property now or hereafter acquired" (pp. 390 to 393). All of the remaining bonds held by the Railway Company have been issued under one or the other of the three last-mentioned provisions of the mortgage (pp. 397 to 398).

The Railway Company, therefore, replies in substance that the bonds which it holds were issued under the same mortgage as that which secures the bonds held by the Intervenor were concededly issued in accordance with its terms and provisions; that the Intervenor is bound by those terms and, therefore, have no standing to contest the right of the Railway Company to participate in the security. The Intervenor rejoins that the Railway Company procured its bonds by fraud; the Railway Company responds that such fact is of no importance as between the intervenors and the Railway Company, unless the Intervenor show that the fraud was perpetrated upon them and that the transactions were had with intent to hinder, delay and defraud them.

Disregarding all forms of procedure and looking only to the substance of the situation and assuming, for the purposes of argument, that the issues are presented upon application in connection with the distribution of the proceeds of the sale, the foregoing presents the sequence of the claims and counter-claims which lead to the issue which the learned Trial Court has determined (although not presented by the pleadings) and leaves the burden upon the Intervenor to establish not only the fraud but that it was committed upon them. If, in the previous portions of this brief, we have disposed of that issue favorably to the Railway Company, it is unnecessary to proceed further. From our point of view, however, the matter can be made so perfectly clear by considering the contract

rights of the parties, that we have done so, with the result that, both upon reason and authority, it appears to us that unbiased minds should find it impossible to reach divergent conclusions. As we read the opinion of the learned Trial Judge, he was sufficiently impressed with the argument upon this head to himself develop the fraud theory and ultimately to rest his conclusions thereon.

In considering this point, we again call attention to the fact that the record contains no evidence showing when the intervenors became creditors of the Company; that they acquired a very large proportion of the bonds which they control after their bill was filed, and that it is a general rule of law that one who becomes a creditor of a corporation after the acts of which complaint is made has no standing to attack such acts.

Toledo, etc., R. R. Co. v. Continental Trust Co., 95 Federal, 497.

It is obvious that the only classes of persons, who, by any chance, can have any interest in the transactions in question are,

- (a) Stockholders of the Power Company,
- (b) General creditors of the Power Company,
- (c) Holders of the First and Refunding Bonds,
- (d) Holders of the Consolidated or Second Mortgage Bonds.

Taking up these *seriatim*, one of the Intervenor's assertions is that, since the Railway Company held practically all of the capital stock of the Power Company, stockholders could not complain. Discussion under this head is bootless, however, because, to the extent that the Railway Company controlled the stock of the Power Company, it was, of course, entitled to ignore its rights in that regard in any manner that it saw fit.

As no general creditors are complaining, no purpose can be served by considering their rights or interests.

In this connection, however, we deem it pertinent to make further reference to the opinion of the learned Trial Judge for the purpose of disclosing the extent to which, in determining these particular issues, he found it impossible to

limit consideration thereof to this particular record. Thus, his opinion states (p. 150) :

" From what fund the certified expenditures on account of capital were made does not appear (this statement is erroneous, as we shall hereafter show), but that for the protection of their security they were interested in having these bonds honestly used for the benefit of the estate becomes apparent, *when the fact is noted, as shown by the record here, that preferential claims for labor and supplies, for the maintenance and operation of the property, aggregating an amount relatively of great magnitude, are being ^{raised} ~~approved~~ for allowance, in at least one of which the Railway Company itself is ^{interested} ~~pressing~~, and which, if established, will substantially reduce the value of the intervenors' security. These and other considerations strongly persuade me to the view, etc.*"

" So far as we can ascertain, the claims to which the learned Judge refers are not shown by the record here, yet he states in so many words that the fact of their pendency persuades him to the views which he expressed. Though the preferential claims mentioned were a part of this record, it is incomprehensible to us that their assertion can or should in any manner affect the conclusions to be here reached, except insofar as they might tend to suggest that, if allowed, a deficiency would exist in the security of the First Mortgage Bondholders. Mention of their existence in that connection was unnecessary, however, because, in his entire opinion, the Court had assumed that such a deficiency would result and, in order that the issues might not be unnecessarily clouded, counsel for the Railway Company's Receiver had, at the trial, apparently acquiesced in that assumption. If the preferential claims are valid, they will, of course, be allowed ; if invalid, they will not be allowed. Their allowance or disallowance can, however, have no effect upon the fundamental questions here at issue because, whether or not the contracts of September and December, 1912, had been made, *non constat* but that the preferential claims would have existed, and their magnitude and the principles upon which they will be allowed or disallowed have not, so far as

can be judged from any evidence in this record, been affected by the contracts under consideration.

Of the parties possibly interested in these issues, there is left, therefore, the holders of the bonds issued under the two mortgages. As all of the Second Mortgage Bonds except \$166,000, the holders of which do not complain, are held by the Railway Company, it is apparent that the Railway Company combined in itself practically all classes of rights and claims which are affected by the questions involved herein, except the First and Refunding Bonds.

Regardless of all questions of insolvency and fraud, what, then, were the rights of such Bondholders? Surely in the absence of any fraud practised directly upon them, they must be found within the four corners of the contract or contracts which they have made. These contracts are set forth in the bonds and in the Trust Deed or Mortgage which secures them, the material portions of which have hereinabove either been quoted or called to the attention of the Court. The only fiduciary relationship involved in these contracts is that which the mortgagee or trustee assumes. So far as the mortgagor and the bondholders are concerned, the relation is solely that of debtor and creditor and is wholly measured by the terms of the contract. As no claim is here made against the Trustee under the mortgage, there remains for consideration only the relationship of the mortgagor and the bondholders.

The principal stipulations of the contract concern the aggregate of the obligations which the Company is entitled to create thereunder, the security which the holders of the bonds are to receive, the rate of interest which is to be paid, and the time and manner of its payment, the duration of the obligations, and the rights of the holders of the bonds in case of default. Practically all additional provisions of such instruments deal with some detail of these principal points. As modern business conditions are becoming more complex, the elaboration of such details is becoming more pronounced. Many provisions now found in such instruments are of recent evolution and, for that reason, have not yet undergone conclusive judicial construction. Among these are clauses entitling the mortgagor to increase the aggregate of bonds outstanding in some proportion as the value of the property com-

ing within the lien of the mortgage increases. These provisions are, however, just as much a part of the contract between the mortgagor and the bondholders as any other provisions of the bond or of the mortgage and the respective rights of the parties, insofar as they relate to such provisions, must be determined thereby.

We have already pointed out the provisions of the contract under which all of the bonds were to be issued, have called attention to the fact that the Power Company has scrupulously adhered to their terms and that, accordingly, the bonds here in question were issued only after the security for those held by the intervenors had been increased in the manner and to the extent stipulated. Thus, with the exception of \$24,000 thereof, which were issued to reimburse the Company for monies expended by it in retiring an equivalent amount of underlying bonds, and \$52,000 thereof issued in connection with the purchase of additional plants and property, all of the bonds in controversy were issued for 90% of the sums expended by the Power Company for improvements and betterments. In other words, 652 of the 718 bonds were issued for 90% of the sums expended for improvements and betterments. This means that, before these bonds were certified, the intervenors' security had been enhanced as follows :

Cost of improvements and betterments	\$724,445
Underlying bonds paid	24,000
Additional plants and properties purchased.....	52,000
<hr/>	
Total.....	\$800,445

The total number of First Mortgage Bonds outstanding, in addition to the 718, is \$2,494,000. In other words, from some source, the security of the intervenors and other bondholders had, before these bonds were issued, been increased to the extent of substantially 33 $\frac{1}{3}$ %. If, prior to the issuance of these bonds, their security was adequate, surely the issuance of \$718,000 of bonds against property of a cost value of more than \$800,000 did not depreciate that security, while if the security was then inadequate, it was increased to the extent of the proportionate interest of the other bondholders in \$72,445, which measures the difference between the cost of the betterments and im-

provements against which a part of the bonds were issued and the face amount of the bonds issued against the same. It is clear, therefore, that, upon no possible theory can the issuance of these bonds be shown to be detrimental to the interests of the bonds represented by the intervenors, unless they are to be given the benefit of the expenditure of more than \$500,000, supplied by others than themselves, to which they did not contribute one penny. That, in its baldest terms, is the position of these intervenors. If it be equity, having in view the contract obligations of the parties, we confess that we are unable to understand what may properly be termed iniquity.

The great difficulty of the Trial Court was that, subconsciously, he was affected by conditions obtaining at the trial of these issues, whereas the validity or invalidity of the transactions must be determined as of the time when they took place. They were then legal or illegal, proper or improper, fraudulent or not fraudulent; and, except insofar as they may properly influence the conclusion as to the intent of the parties at the time, subsequent events must be entirely disregarded.

Suppose that the underlying bonds represented by \$24,000 of the \$718,000 in bonds had never been retired; that the plants represented by \$52,000 of the bonds had never been acquired, and that the betterments and improvements costing \$724,000 had never been made. Obviously, this controversy would not have existed. In that event, however, does any suggestion or fact in the evidence affirm that the intervenors' bonds would, proportionately, have been better secured than is the case under existing conditions, and with the 718 additional bonds outstanding? As above stated, is not the only reasonable conclusion from the facts that, because of the 90 per cent. clause, such bonds are now better secured and, therefore, that the intervenors will realize more thereon than though the property represented by the 718 additional bonds had never been acquired? And if these inquiries must be answered in the affirmative, upon what possible theory can these intervenors have been disadvantageously affected by the issue of such bonds?

The intervenors pretend to appeal to a Court of Equity on the broadest grounds, yet the substance of their appeal is that the Court give them the advantage of the expenditure of more

than \$800,000 of others' monies and their assertion is that, unless that appeal be granted, forsooth, a fraud will have been done them. Is it possible that such a position can stand the test always applied by a Court of conscience? If so, truly things are becoming topsy-turvy, and, it would seem to us, too much conscience, if not too much learning, is making some of us mad.

Without again referring to the particular language of the contract providing for the issuance of these bonds, its intent appears to us to be perfectly clear and, therefore, to be susceptible of no misconstruction. Its effect is that by complying with the required details, whenever the Company desired to retire any underlying bonds, it might issue for the purpose First and Refunding Bonds of a face amount equivalent to those to be retired; that whenever the Company acquired or desired to acquire additional property, by complying with the details prescribed in that connection, it might issue under said mortgage bonds of a face value equivalent to the value of the property acquired or to be acquired, and that whenever it had made expenditures for improvements and betterments to to an amount greater than the face value of any of the unissued bonds, by evidencing such expenditures to the trustee in the manner stipulated, additional bonds might be issued to the extent of 90 per cent. of such expenditures. The language is so plain and comprehensive that no discussion of these provisions of the contract is required for the purpose of demonstrating that everyone who acquired a bond secured by the mortgage agreed in terms that additional bonds, issued as therein prescribed should, so far as concerned sharing in the lien or security of any and all property at any time covered by the mortgage, be upon a plane of equality with that of his own bond.

Such being the contract, if it is observed by the mortgagor, what possible interest has any bondholder in the use which is made of any other bond, after its proper issue? The holder of the first bond disposed of by the mortgagor understood clearly that, up to the limit provided by the contract, upon compliance with its terms, additional bonds could be issued; and the holder of each bond subsequently disposed of accepted the same with a similar understanding. Accordingly, by accepting the bonds which they hold, each and all of

the intervenors agreed that the 718 bonds might be issued by the mortgagor at the times and under the circumstances and conditions which surrounded their issue. Having made that agreement, since it compasses their entire rights in the premises, upon what possible contract theory can they exert rights beyond the terms of their contract? They concede that the trustee has observed all of its duties toward them in connection with the issuance of the bonds and, therefore, they concede that the mortgagor has received and placed under the lien of the mortgage all of the additional assets which it agreed with them that it would receive and subject to such lien before the additional bonds were issued. Having thus exactly performed its agreement with them, how can they be heard to complain with respect to any disposition of the bonds by the corporation, when they agreed that it might issue them as soon as their security was enhanced to the required extent?

Cannot the question be reduced to its simplest form by satisfying ourselves as to the ownership of the bonds when they were certified and delivered to the mortgagor? Surely no justification exists for any claim that they were the property of the intervenors; and can anyone suggest any theory upon which they could have become the property of any other than the mortgagor? Having become its property, were they, while in its possession, impressed with any trust for the benefit of anyone and, if so, for whom? Having fully performed its contract with the intervenors, what possible basis is there upon which can be raised a claim that, when the bonds were issued to the mortgagor, they were received by it charged with any trust in behalf of the intervenors?

If trust there were, how do we discover the beneficiaries? Having acquired the bonds under a contract with the trustee under the mortgage and with the other bondholders, what different relationship did the mortgagor bear to the property so acquired than to that which it acquired under any other contract which it made in connection with the performance of its corporate functions? Unless there be a response to these inquiries other than that which we have been able to discover, the bonds became the absolute property of the mortgagor, to be utilized by it in furthering its general cor-

porate enterprise, in the same manner and to the same extent as did all other property which it acquired. In the last analysis, is not the response of the intervenors to these propositions only that the Power Company sold the bonds at too low a price? And if this be the situation, are the rules which determine the rights and liabilities following such a disposition any other or different than those which determine the rights and liabilities following the disposition of any other corporate property?

If our reasoning to this point is accurate, the intervenors have no claim against the Railway Company, because the contract with them was rigidly observed and they have no rights beyond its terms. It follows, therefore, that had the bonds been distributed gratis among the directors the rights of the intervenors would not have been affected, and, consequently, they would not have been entitled to contest the title of the donees. We here present the baldest and most aggravated transaction which, short of the commission of a crime, can be imagined in order to illustrate the fundamental nature of the proposition which we are advancing. Lest the suggestion impress the judicial mind as abhorrent, we hasten to add that the intervenors could not have complained of such aggravated dereliction of duty, because they were not harmed thereby, and, therefore, had no interest therein. They are, in no sense, the guardians of the public morals nor of the rights and interests of the mortgagors, stockholders, general creditors or of the other holders of the consolidated bonds, which, together, constitute all of those who could, by any chance, have any interest in such illegal acts of the directors.

Although, upon principle, we could perceive no escape from the soundness of these propositions, at the time of the argument below, although submitting cases which illustrated the principles involved, we were not able to supply the learned Trial Court with judicial authority dealing with a state of facts precisely analogous to those here present, so far as the contract rights and interests of the intervenors are concerned. Fortunately, we are now able to do so in a case which, we are happy to say, exactly supports our reasoning.

Bank of Toronto v. Cobourg, etc., Ry. Co., 10 Ontario, 376.

This case is so directly in point that we will quote from the report thereof at length, fearing lest the volume itself may not be available to this Court.

At the outset, the report states :

“The circumstances out of which the present appeal arose fully appear from the judgment of the Master-in-Ordinary, which was delivered by him on January 8, 1885, and was as follows :

“Mr. Hodgins, Q. C., Master-in-Ordinary. The judgment directs an inquiry as to who other than the plaintiffs are the holders of the bonds of the same class of the defendant Company, and an account of what is due to such bondholders.

“These bonds * * * *are declared to be a first charge upon the property of the Company.* The debentures were intended to be issued at a discount, and several of them were so issued, but others were *taken by some of the present holders at par.*”

The Master then states that debentures were issued to three persons named to the extent of \$156,000 face amount, out of a total issue of \$300,000, and that the \$156,000 were issued at a discount of 25%, for “monies obtained by the defendant company on the discount of notes made or endorsed by these parties for the benefit of the company.”

“At the time the proceeds of this discount were received by the Company, the Schoenbergers and Butts (those to whom the questioned bonds were issued) were directors of the defendant Company. * * *

“The plaintiffs contend that these parties * * * as being directors * * * can only claim the amount actually advanced by them to the defendant company ; that they could not, as such directors, sell these debentures to themselves at a discount, nor could they claim to hold them at a profit beyond what the company owed them on the notes discounted for its benefit.”

After stating that the act under which the debentures were

issued authorized their lawful issue at a discount, the Master continued :

“ The Act also makes these debentures *a first charge on the property and franchises of the company, without preferment or priority of any one debenture, so to be issued, over any other debenture so to be issued.* It further gives the debenture holders the right to foreclose. * * *

“ The judgment provides for a sale instead of a foreclosure ; but that cannot be held to alter the statutory rights expressly given to these debenture holders by the Act.

“ The plaintiffs as debenture holders are creditors of this company of the same class as the directors referred to. *There is no fiduciary or trust relation between the plaintiffs and these directors, which would entitle the plaintiffs to invoke the equitable jurisdiction of the Court.* As directors of the company they owed no trust or duty to the co-holders of debentures which would compel them to hold or dispose of these bonds or debentures for such co-debenture holders. These directors obtained a title to these debentures before the plaintiffs became debenture holders. The plaintiffs, therefore, had no beneficial interest or claim in the debentures when these directors obtained theirs.

“ All holders stand on the same footing, *inter se*, as creditors of the Company. Each debenture holder knows that he holds part of an issue of debentures for \$300,000 *pari passu* with other holders ; that they are all alike as to payment, rate of interest, and remedy ; that there is no priority among them, and that they are in every way placed on an equality as between themselves.

“ The parties whose property is chargeable with, or which may be foreclosed or sold to pay these debentures—the company or its shareholders—are *the proper parties to complain of these directors ; but they do not complain.* They, as the *cestuis que trustent* of these directors, are alone entitled to any profit, if profit there be, acquired by them as their trustees.

“ No case has been cited to shew that any such

claim of a *cestui que trust* vests in, or can of right be enforced by, the creditors of such *cestui que trust*, as these plaintiffs are. And it is well settled that a trustee's claim against a trust estate cannot be enforced by the creditors of such trustee (citing).

* * * * *

“ A similar rule prevails in the jurisprudences of the United States.

“ The purchase by a trustee of property of his *cestui que trust* is voidable at the option of the latter. But he may affirm the sale, or not impeach it; and if regular in other respects, it cannot be questioned by third parties on the ground of its being a purchase by a trustee. It is the fiduciary relation to the beneficiaries of an estate which prevents the trustee from purchasing the estate. But a violation of his duty in this respect may or may not be questioned, at the option of the beneficiaries, but not by persons who have not that relationship to the trust estate; *Baldwin v. Allison*, 45 Minn., 25.

“ So where the administratrix of an estate foreclosed (or sold under process of a court) certain lands which had been mortgaged to the intestate, and purchased the lands for herself, it was held that although the sale might be set aside by the heirs, its validity could not be questioned by the creditors of the estate (citing).

“ Nor is the assignee of a beneficiary or *cestui que trust* entitled to an account against trustees for a breach of trust, or to apply to a Court to avoid transactions between such *cestui que trust* and his trustee, on the ground of the fiduciary relationship between them; *Hill v. Doyle*, L. R., 4 Equ. ty, 260; *Rice v. Cleghorn*, 21 Indiana, 80. In the latter case the Judge said: ‘ The purchase of trust property by a trustee is not void, but may be avoided by the *cestui que trust* within a reasonable time, in a direct proceeding for that purpose; but such a result cannot be effected at the suit of a third person.’

“ Nor can one who holds possession of the trust estate, under the *cestui qui trust*, invoke the fiduciary or

trust relation to impeach a wrongful purchase made by the trustee of such trust estate" (citing).

* * * * *

" Besides, these directors are here as creditors enforcing their rights as such. *Rightly or wrongly*, as between themselves and the company, *they have possession of these debentures as creditors, and this proceeding is not a proceeding to make them account as trustees.* * * *

" In no sense, therefore, can these directors be held to be trustees or agents for the plaintiffs or other co-debenture holders, or bound by any fiduciary or trust relation to account to them for their acquirement of these debentures."

The report then states that the Master fixed the sums due the directors and their representatives, as bondholders, at the principal amount of their claims with interest ; and that thereupon, the plaintiffs appealed from the report of the Master, on the ground, as set out in the appeal,

" That the said Master should have found and reported that the said parties were not entitled to rank upon the estate of the said railway company in respect to the said bonds and interest, but if entitled at all they were only entitled to be paid the amounts actually advanced by them to the said company in respect to the same, and the said Master erred in allowing the *said parties to prove as creditors to the full amount of the face value of the said bonds.*"

The report then gives at some length the arguments of counsel ; from which it is interesting to observe that, for the appellants, it was insisted that, " If the Master is right, the company might have handed over these debentures as a gift, and yet we could not object because the company is not objecting."

Also that, " We are entitled to say that in the hands of the directors these bonds form no debt against the company at all. At the same time we are willing to concede that they succeed to the extent of the monies actually advanced by them."

The defendants responded to the effect that, "If the company has to raise money to carry on its business, and if it has to issue debentures in order to pay its debts, must it not pay these debentures? Is not paying these debts part of the business of the company? * * * There being a good legal consideration, why should we not hold the debentures? * * * In the Master's office the defendants desired to shew that the full amount was not advanced. The company has never questioned these transactions, and the company is a party here."

In reply the appellants argued that,

"The plaintiffs' position is not identical with that of the respondents. The plaintiffs have only claimed to hold debentures held by them as security for what is actually due them. The respondents claim the full amount due on the face of their bonds and interest upon them. The Act makes all the debentures a charge without preference or priority, but the effect of the directors' action is to give these respondents a preference and priority. The plaintiffs have advanced \$80,000 and the defendants only \$40,000, yet the Master has found larger sums due the defendants than the plaintiffs, thus giving the defendants a preference. The defendants cannot charge the lands of the company for any greater sum than they actually advanced in respect to the debentures actually held by them, and interest thereon. If the debts of the company had not been paid by the advances of the defendants, the creditors could only have recovered the amount due them. The claim of the defendants under the debentures is substituted for the claim of the creditors who have been paid by the advances, and cannot be enforced against the property of the company to any greater extent than could the claims of the creditors which have been paid."

In confirming the conclusions of the Master, the Chancellor said :

"This action was brought by the plaintiffs in a representative capacity, and on behalf of all holders of

the debentures of the railway company." The respondents in this appeal were, therefore, substantially plaintiffs, as being holders of some of these securities, *and it is not competent for the plaintiffs on this record to attack their status*, and say that they cannot prove for anything. Though the argument was pressed thus far, it was nevertheless conceded that the bank was willing that the respondents should prove for so much of the money advanced by them as went into the road, or for its benefit; but it is disputed that they should prove for the face value of their debentures. The transaction between them and the managing director who was empowered to act for the company, is to be looked at. The bargain was, that they should take their securities in satisfaction and payment of their claims against the company. This involved a transfer of the debentures at some discount, but whatever this was, the transaction was not *ultra vires*, nor was it in any sense void. The company does not complain of it, nor does any shareholder. This being so, it is, in my opinion, *not competent for the holders of other debentures of the same class to impugn the respondents' position*.

"The complaint is, that the directors abused their position so as to get an advantage at the expense of the company. If this be so, it is for the corporation or its corporators to complain. To permit the bank to attack on this ground, would be to recognize the validity of the transfer of a right of action to complain of a fraud, actual or constructive. * * *

"This same view was upheld in *Greenstreet v. Paris*, 21 Gr., 229, which involved the consideration of dealings between a director and his company, and it was held that if the security which he took was capable of being confirmed by the shareholders and they did not nor did the company object, it was not for an outsider to complain."

As further authority that third persons have no standing to require the performance of a fiduciary obligation, we may refer to *Fisher v. McInerney*, 137 Calif., 28, where the real property of a judgment debtor was sold under execution.

Near the end of the period of redemption, the certificates of sale were purchased by his attorney for almost exactly the amount necessary to redeem and the attorney's nominee took the conveyance. He did not object. Held that even though the debtor were insolvent, his judgment creditors could not set the purchase of the certificates and the conveyance aside on the ground of the fiduciary relation between the judgment debtor and his attorney.

In Re Regent's Canal Ironworks Company, 3 Chancery Division, 43, is also an authority which we did not find in season to submit to the learned Trial Court; and the principle of which is directly in point. There, the Ironworks Company duly authorized the issuance of mortgage debentures for £25,000, to consist of 100 debentures of £250 each, and authorized their issue at 95. Sixty of the debentures were taken up by different persons and the remaining 40 were pledged to trustees as security for a loan made the Ironworks Company by the Financial Society.

The debentures were charged upon all the lands, property and effects which the Company held or possessed, or should hold or possess; and each debenture stated that it was part of an issue of 100 debentures of £250 each.

Upon the winding up of the Company, the Financial Society claimed the entire face amount of the debentures which it held in pledge, to which objection was made by the holders of the other 60 debentures, who claimed, *inter alia*, that, since the authorization of the debentures required them to be sold at 95, the Ironworks Company had no right, as against those who purchased their bonds at 95, to issue the others upon a different basis and, accordingly, objected to their participation upon an equality with those purchased at 95. The decree below having gone against the holders of the 60 debentures, an appeal was taken, which was heard by JAMES, L. J., MELLISH, L. J. and BAGGALLAY, J. A. JAMES, L. J., among other things, said :

“ The position of the Appellants is this : They are the owners of six-tenths of an aggregate mortgage of £25,000. They became the owners of that six-tenths of the debenture debt *with full notice that the company intended to deal with the other four-tenths as they might be*

advised. The company has accordingly dealt with the other four-tenths by making it a collateral security for the sum of £8,000 and interest at 10 per cent. That was the bargain between the *Financial Society* and the company. The company could not recede from that bargain, and I cannot see that there is any equity on the part of the holders of the other six-tenths of the mortgage debt to alter the bargain between the debtors and the creditors. * * *

“ The Respondents have got this four-tenths of the mortgage debt quite as much as the Appellants have got the six-tenths, and the mode in which that four-tenths is to be applied is governed by the instrument which was executed between the company and the creditors.”

MELLISH, L. J., among other things, said :

“ It appears to me that the proper way of looking at this case is to inquire what was the bargain with respect to these debentures as between the *Ironworks Company* and the *Financial Society*, and then to inquire whether the other debenture holders have any equity to prevent that bargain from being carried into effect. Now, as between the company and the society, there is no doubt that the debentures were to be a collateral security for the money which was lent upon the promissory note and the interest. That was the bargain between them, and one of the terms of the bargain was that the *Financial Society* was to be entitled to sell the debentures. Mr. Glasse argues, in the first instance, that because the resolution of the directors was that they should be issued at £95 and at 6 per cent. interest, they could not be issued on any other terms. But that was nothing more than a resolution of the directors, and they were perfectly competent to vary that resolution, and to issue them in any other way.

“ Then the real question is : have the other debenture holders any equity to prevent that bargain from being carried out ? *The rights of the other debenture holders depend solely on their debentures, and they have*

nothing to do with the resolution of the directors as to the terms on which the debentures were to be issued. They can claim no greater rights than the debentures give them. The debenture says that the whole number is to be 100. The Appellants have got sixty, and they are all ~~at~~ to have an equal security. They took theirs by giving no doubt £95, and getting £100 security for each £95 that they advanced. Those were the terms, and they left it open to the directors to issue the others on any other terms they might think advisable. I do not see any reason why they should complain of the terms upon which the directors did issue them, namely, as a collateral security for the payment of the notes and interest. They are not injured, as the debentures cannot be paid twice over—they can only be paid once.”

Another case illustrating the principle is *Hodge's Appeal*, 84 Pennsylvania State, 359. There, Harmon executed to trustees a mortgage on certain of his property to secure 200 bonds of \$500 each. Two bonds were sold and duly assigned to Hodge. The other 198 bonds were delivered by Harmon to Whitney as security for indebtedness. The amount of the indebtedness was not known except that it was in excess of \$50,000, which was more than could be realized from a *pro rata* distribution of the proceeds of the sale of the mortgaged premises. The 198 bonds appeared not to have been properly endorsed, and Hodge contended that, inasmuch as he was a *bona fide* holder for value, he should be paid in full before Whitney could claim any part of the funds, because Whitney was not such a holder; that when Whitney obtained the bonds from Harmon, his entire indebtedness did not exist; that the record did not show what indebtedness there was at the time they were delivered; that they were not delivered as security for any money or credit obtained by Harmon at the time of their delivery; that they were not transferable by delivery but only by endorsement as stipulated in the bonds; that the right of the holder of bonds 1 and 2 is superior to any equities which may have been created between Harmon and Whitney by the delivery of the remaining 198 bonds, and also that the equities of the holder of said bonds are superior to the equities of Whitney. It appeared that, by their terms, the holder

of each of the bonds was entitled to the security of the mortgage.

The auditor found in favor of Hodge and awarded him the full face amount of his bonds. Whitney excepted, the court sustained the exception and directed that the fund should be distributed *pro rata* among all of the bondholders. From the decree entered on this decision, Hodge appealed. The Appellate Court affirmed the decree, saying :

“The mortgage is a security for the whole number, and for each and every bond recited in it. By the terms of the instrument they stand in equal protection. *Each bond, therefore, carries only a fractional interest of \$500 in the property mortgaged.* The fund arising from the sale of the property is its representative, and is owned by the bondholders in the same proportion. From the terms and nature of the mortgage, *the time and manner of the transfer of each are not material* ; the only real question being whether each holder is entitled to it.”

We think that the language of the court in the case last cited to the effect that each bond carries only a fraction of interest, to the extent of the face amount thereof, in the property mortgaged is not only absolutely sound, but is most apt as indicating the respective rights of the bondholders under the terms of the mortgage contract.

Neither of the three cases last cited were in our brief below. It did, however, contain other cases, absolutely analogous in principle, but which the learned Trial Court did not mention nor seek to distinguish in his opinion, no doubt because of the fact that he disposed of the issues upon the ground that the Power Company was insolvent and that the contracts were made with intent to defraud these Interveners.

The first case is *Atwood v. Shenandoah V. R. Co.*, 85 Va., 966-978.

There the Railway Company had issued a mortgage, the terms of which limited the bonds to be issued thereunder to \$15,000 per mile. Before all of the bonds had been issued under this mortgage it became apparent that the road could

not be completed through expenditures at that rate, and that certain extensions were desirable to place it upon a favorable operating basis. In order to obtain funds to continue the construction and to make the extensions a general mortgage was created authorizing an issue of bonds up to \$25,000 per mile, the lien of which mortgage was to be subordinate to that of the first. In order to strengthen the security of the second mortgage bonds, the Company caused to be certified \$1,560,000 of bonds which, at the rate of \$15,000 per mile, it *would be* entitled to have certified upon the completion of the road; and pledged the same under the second mortgage. Prior to the creation of the second mortgage \$2,270,000 of bonds had been issued under the first. Accordingly, the \$1,560,000 of additional first mortgage bonds issued and pledged under the second mortgage constituted a very large proportion of the aggregate of the bonds claimed to be secured under the first mortgage. At the time that the action was brought, the Railroad had been completed in accordance with the requirements of the first mortgage, so that, when the questions presented were considered, *the security behind the same was precisely that which was originally contemplated by the contract made between the mortgagor and those who had purchased the \$2,270,000 of bonds*, and who had intervened in the proceedings and raised the questions which were considered.

Whether or not the first or general mortgage, or both, were under foreclosure, does not clearly appear from the report, especially as the trustee under each mortgage was the same. As stated, however, it is clear that appellants presenting the issues material to the case at bar were first mortgaged bondholders who had intervened in the foreclosure suit after it was begun (pp. 969, 970). When they were admitted, one Clarke was also permitted to intervene in his own behalf as a holder of general (second) mortgage bonds and in behalf of all the other holders of such bonds. The individual first mortgage bondholders answered Clarke's petition in intervention and alleged that the deposit of 1560 of the first mortgage bonds as security for the general mortgage was unauthorized and illegal; that the trustee had taken a position antagonistic to the interests of the first mortgage bondholders and that the question as to the validity of the 1,560 bonds was one of the

issues in the pleadings with respect to which testimony had been taken before the Master, who had already held such bonds to be invalid. It appears also that the Master had theretofore taken testimony upon all of the issues and upon the rights of all of the parties and had prepared and submitted to counsel a draft report which, among other things, found against the validity of the 1,560 bonds. After the general mortgage bondholders intervened, additional testimony was taken, but, apparently, the Master did not change his report, although he filed therewith all of the testimony taken before him (pp. 971-972). The order sending the matter to the Master required him to ascertain "the rights of the respective classes of creditors * * * to satisfaction out of its (the mortgagor's) property and assets, and the amount due or to become due to said classes respectively."

He was also directed to take an account "of the amounts due or hereafter to become due under the respective deeds or mortgages which" had been made by the Railway Company showing "the relative rights and priorities and the property included or conveyed by said deeds respectively" (p. 969).

In behalf of the general mortgage bondholders, Clarke excepted to the report of the Master upon the ground that he had held invalid the 1560 first mortgage bonds deposited as security under the general mortgage; and it was upon such exception that the court heard and determined the question, from which determination the individual first mortgage bondholders appealed. The analogy of the situation of the bondholders there considered to that of the intervenors here is, therefore, extremely close. In disposing of the matter, among other things, the Court said :

"It is not perceived that the Railway Company, in thus pledging these 1560 first mortgage bonds, as security for the benefit of the general mortgage bondholders, *did any injustice to or violated any contract rights of the first mortgage bondholders.* * * * The road has been extended and completed and bonds at the rate of \$15,000 per mile, and no more, have been issued under and in pursuance of the terms of the first mortgage, the \$2,270,000 of bonds held by the first mortgage bondholders, and the \$1,560,000 of extension

bonds issued thereunder and pledged for security of the general bondholders, together, make the aggregate of \$3,830,000 at \$15,000 per mile of the line of road actually constructed.

"The proceeds of the bonds held by the first mortgage bondholders were expended entirely upon the construction of the part of the road north of Waynesborough, not a dollar thereof having been expended south of that point, while the extension south of Waynesborough was built exclusively with funds derived under the general mortgage. *Yet, the first mortgage bondholders claim a lien over the entire line of road prior and superior to those of the general mortgage bondholders. The claim is preposterous.*

"It is true that the general mortgage was made expressly subject to the first mortgage, but, be it observed, *it is subject not to the rights of the present first mortgage bondholders merely, but to all the rights secured by the first mortgage, prominent among which is the right to issue and use the additional bonds here in controversy.* * * * Though these 1560 first mortgage bonds issued and deposited as collateral for the general mortgage bonds he held to be valid securities under the general mortgage, and they certainly are such, *how does that fact impair in any way the contract rights of the first mortgage bondholders?* * * * Suppose the Railway Company had issued those bonds and put them on the market for the purpose of securing funds with which to aid the construction of the extension of its road, and it undoubtedly had the right to do so, in what worse position would the first bondholders be placed than they are by the application of them as strengthening plaster—as a first lien backing support to the general mortgage bonds? It is certain they would be in the same relative position now held by them, *and that is the position of their own choosing.*"

Does not the language of the Virginia court apply almost precisely to the situation of these intervenors? As the road there had been completed and was subject to the lien of the first mortgage bondholders at the rate of \$15,000

per mile, so here the additional properties have been purchased and the additional improvements and betterments made, all as stipulated in the contract. As stated in the opinion, therefore, how could the issue of the additional bonds do "any injustice to or violate any contract rights of" the first mortgage bondholders whose securities had been issued prior to such acquisitions?

While there the first mortgage bondholders claimed a lien over the entire line of road to the cost of constructing the extensions of which they contributed nothing, prior and superior to the lien of the second mortgage bondholders, as represented by the remaining 1,560 first mortgage bonds, here the holders of the bonds first issued claim a lien upon the entire property of the Power Company, including the ~~acquisitions of~~ additional properties and the betterments and improvements to the cost of which they contributed nothing and for which the 718 bonds were issued. In the language of the opinion, "the claim is preposterous."

The controversy there was between the first and second mortgage bondholders. Had these 718 bonds been delivered to the trustee under the Power Company's second mortgage, the situation of the two cases would be absolutely identical. Suppose that this had been done and the issue here was as to the price, terms or conditions under which the second mortgage bonds had been issued or as to the right, after foreclosure, of the holders of the second mortgage bonds to participate in the proceeds of the first mortgage security, can it be reasonably contended that these intervenors would have had any standing for such a contest? And if not, why? Is not the only answer that they have all the stipulations of their bond and that they are not entitled to more? Since the company might have utilized the bonds as security for its second mortgage bonds, why might it not legally and properly exchange its first for its second mortgage bonds? So far as its obligations were concerned, they were precisely the same with respect to both classes of bonds; that is, it was equally bound to pay the seconds as the firsts. From its standpoint, therefore, when, by making such exchange, it reduced its interest charges to the extent of more than \$7,000 per year, not to mention the \$250,000 received at the same time by way of loan, how can it be said that the interests of the company were made to

suffer any more than though the 718 bonds had then been deposited as security for the second mortgage bonds, which deposit, under existing conditions, would, except as to the 166 second mortgage bonds held by others than the Railway Company, have brought about precisely the situation which now exists; that is to say, the *pro rata* interests of the 718 bonds in the proceeds of the sale would have been required to be paid to the trustee under the second mortgage and all of such proceeds, except the proportionate share of the 166 bonds, would have come to the Railway Company.

Another of the statements of the Virginia Court of Appeals which we have emphasized by our italics is equally applicable here, namely, that though the general mortgage there was expressly subject to the first mortgage, "*be it observed, it is subject not to the rights of the present first mortgage bondholders but to all the rights secured by the first mortgage, prominent among which is the right to issue and use the additional bonds here in controversy.*" Again, using the words of the Virginia court, assuming the validity of the 718 bonds and their security under the first mortgage, "how does that fact impair in any way the *contract rights* of the first mortgage bondholders?"

Suppose further that, as the ^{Power}~~Railway~~ Company had the right to do, it had issued those bonds and put them on the market, it could have sold them for whatever price they might have brought, be it much or little; in which event "in what worse position would the first bondholders be placed than they are by the application of them" to the procuring of funds and the release of large liabilities. Thus, the Power Company obtained for these bonds \$250,000 in cash, with a year's time within which to recuperate and, if necessary, remodel its business, during which time it would save more than \$7,000 in interest charges; these funds enabled it to continue its business as a going concern and enabled it to continue to indulge the opportunity of establishing itself upon a profitable basis; the subsequent contract, under which 218 bonds were received, enabled it to be rid of a cash claim of more than \$85,000, to terminate a construction contract which, as then anticipated, if completed, would have cost it \$100,000 more than if the work ^{were} done under its revised plans; it was ~~to~~ enabled it to utilize \$25,000 of

its second mortgage bonds in lieu of \$20,000 of cash, because of the Railway Company's guarantee or agreement to purchase; and it obtained the benefit of 50 shares of the Railway Company's preferred and 100 shares of its common stock which, whatever now may be the case, was then, undoubtedly and justifiably, considered to possess value.

Had the 718 bonds been forced upon the market with the statement that the Company's earnings during 1912 were showing a deficit of more than \$50,000; that these results were obtained at a time when its rates to its customers were satisfactory; that a powerful competitor was coming into the field who was then soliciting, and in December had obtained contracts from the Power Company's customers on the basis of reduction in service charges of approximately 40 per cent., that, in order to retain any part of its business the Power Company would be compelled to meet these reductions, and, possibly, to go below them which would, necessarily, precipitate a rate war, as the result of which both companies would likely conduct their business at a loss until one or the other should be financially exhausted; if these statements had been made to the public in connection with an offering of the bonds, and it would have been dishonest and dishonorable in the last degree had the bonds been offered to the public without such a statement, would this Court say that the bonds could have been sold on a basis which would have realized for the Power Company the net results which it obtained from the two contracts in question? In the language of the Virginia Court of Appeals, we say again "the claim is preposterous."

In order to reach this conclusion, it is unnecessary that the Court shall be an expert in the sale of corporate securities. Judges are not debarred from exercising the judgment which is credited to the average business man; and, considering our suggestion in that light, we cannot believe that any unprejudiced court will be able to conclude that the bonds could have been sold at any price. Most respectfully, therefore, we submit that the suggestion contained in the opinion of the learned trial court to the effect that those 5 per cent. first mortgage bonds might then have been sold at a reasonable discount, for which reason, the failure of the Railway Company interests to follow that course must necessarily be held to convict them of

an intent to defraud these intervenors or any other man, woman or child in the universe, was wrong, dreadfully and most seriously wrong; and that the plainest dictates of justice and of the considerations which should affect men in their dealings with each other, require that the printed record of this charge of fraud and unfair dealing which has now been distributed broadcast, shall, to the extent that this Court is able so to do, be expunged from the tablets of time; and that this Court shall give the same publicity to the arguments and conclusions, which we fervently hope and seriously believe it will advance and reach, repudiating these grievous accusations and removing from the records of honorable men the imputation and stain which has been placed upon them by the learned trial judge. We trust that the Court will pardon us if, at times, the language of this brief is somewhat vehement. In extenuation, we beg to say that, although, as previously stated, he had no association with the transactions here questioned, some of the men here accused are the writer's friends, whose thoughts, general intentions and every day attitude toward the world, he knows from personal contact; whose consideration for the very bondholders, some of whom are now represented by the intervenors, after coming into this matter, he had an opportunity to observe; and whose regret that such bondholders were sufficiently misguided by these intervenors to be influenced greatly against what they believe to be their best interests, he has been enabled to consider and understand.

Weed v. Gainesville R. Co., 119 Ga., 576, is another case, the underlying principle of which is directly in point. The report of the case is long and somewhat involved. A careful consideration thereof, however, discloses the following: It was a consolidation of two foreclosure suits. The holders of \$83,500 of a total issue of \$245,000 of first mortgage bonds *intervened individually* and set up that the disposition of the majority of the stock of the mortgagor *and of the remaining \$161,500 of bonds authorized under the first mortgage* were *ultra vires* and invalid; and that the present owners of the \$161,500 of bonds "were not entitled to share equally in the proceeds of the sale of the mortgaged property" (pp. 581 to 585, 589 and 590). The Auditor found against the individual intervenors, who appealed from the order overruling

their exceptions ; and it was upon such appeal that the court considered the right of the individual first mortgage bondholders to raise the question as to the interest of the other first mortgage bondholders in the security under that indenture. The argument was, as before shown, that the \$161,500 of bonds were *disposed of* illegally ; and the Court will observe that the complaining bondholders there represented one-third of the total issue and were seeking to exclude from participation two-thirds of that issue, and that, accordingly, the situation of the contending bondholders there was, so far as percentages on return are concerned, greatly more serious than is the situation of the intervenors here. The point was also made there that the \$161,500 of bonds had been issued to a competing company which, under a Georgia statute, also rendered such issue illegal. The opinion was by Mr. Justice LAMAR, now a member of the Supreme Court of the United States. Among other things he said (p. 590) : " Bondholders are not authorized to act as guardians for the public or the parties, in having such a contract set aside or declared to have been illegal * * *."

The decree of the court entered upon the findings of the master, to which exception had been taken by the holders of \$83,500 of bonds, was affirmed.

In *Keystone Nat. Bank v. Palos Coal Co.*, 43 So., 570, the bill was filed by a bondholder for the benefit of himself and all other bondholders, as well as for general creditors, and prayed " the annulment " of certain bonds issued under the same mortgages under which those held by plaintiff were issued, on the ground that they had been *illegally disposed of* by the company. The language of the court is peculiarly apt in its application to our case. Thus (p. 571) :

" While the bill prays specifically for the ' annulment ' of certain bonds held by the respondents, the relief sought in this respect is inappropriate to the facts stated in the bill. The bond issue was for corporate purposes and benefits, and was made under corporate authority, and it is not pretended, in so far as is shown by the facts stated in the bill, *that there was any illegality in the issue of the bonds*. The facts stated tend to show, *not an illegal issue, but rather an illegal disposi-*

tion of the bonds after the same had been legally issued. If the bonds were 'hypothecated' without consideration, and in this manner parted with and disposed of, this would be a corporate wrong. The remedy in such a case, it would seem, would not be the 'annulment' of the bonds, but a restoration of the bonds to the rightful custodian, and the relief should be sought and had in the name of the corporation."

The bill was dismissed.

Further discussing the situation there shown, the court said (p. 571) :

"It is not shown whether the general creditors are subsequent or prior creditors to the issue of the bonds. A general creditor, as well as a bond creditor, may attack the illegality of issue of bonds secured by mortgage on corporate property (3 Cook on Corporations, 5th edition, Secs. 766a, 848) ; and having a common grievance to be remedied, and with like relief, namely, the 'annulment' of the *illegal issue*, no reason appears why the two classes of creditors, to that end and in a proper case may not join in the same bill."

The bondholder may attack the *illegal issue* of bonds secured by the same lien as his own, if for no other reason, because it violates his contract. As the court pointed out, however, when the bonds have been legally issued, that is (in our case) when the additional property, improvements and betterments have been obtained or made, due evidence thereof represented to the trustee and the bonds certified by it and delivered to the mortgagor, they are legally issued. Accordingly, if, as in the case last discussed, they have been hypothecated *without consideration* (which is tantamount to the situation resulting from a gift of the bonds), the question becomes one of their proper disposition, which question is beyond and outside of the terms of the contract between the bondholders and the mortgagor and one solely between the corporation or its stockholders, the legal or equitable owners of its property, and those who participated in the alleged illegal transaction (disposition).

Of course, in considering the transactions as exchanges of

first for second mortgage bonds, the question is one purely of a legal consideration and, therefore, cannot in any view of the case affect the rights of the intervenors. That such questions are within the powers of a corporation and its officers to determine, was decided in *Clafin v. S. C. R. Co.*, 8 Fed., 118, 131, where the opinion was written by Chief Justice WAITE of the Supreme Court of the United States. There, the corporation had utilized bonds secured by the mortgage in question to pay wholly unsecured obligations, just as in the case at bar, the exchange of the first mortgage for the second mortgage bonds, discharged the obligation under the latter. The court said :

“ There was no actual exchange of bonds, but the new bonds were put in a way of being applied for the old ones. All this, as it seems to me, is *within the scope of the mortgage*. *It may not have been judicious management but it was within the discretion of the company*. *The only contract with the individual bondholders is that the mortgage security shall not be diverted from its designated uses.*”

And that there is nothing *per se* illegal in exchanging an inferior for a superior security is also held in the following cases :

Re Snyder, 59 N. Y. Supp., 993.
People v. Stevens, 90 N. E., 60.

In *Farmers Loan & Trust Co. v. Toledo*, 54 Fed., 759, it appeared that a bank seeking to participate in the proceeds of a sale of properties covered by a mortgage and purporting to secure bonds which it held, was met with the objection on the part of the other bondholders—that the bonds had been originally pledged to the bank and—that, at a sale to foreclose its pledge, the bank had itself illegally become the purchaser, for which reason, it could not be held to be the owner of the bonds and entitled to prove for their full amount. In deciding the matter, among other things, Judge JACKSON, speaking for the court, said :

“ The sale and purchase of these bonds by the bank
 * * * was not, *per se*, void. It was at most only

voidable at the instance and upon reasonable objection upon the part of the corporation or its stockholders.

Third parties or strangers have no right to question or challenge the bank's title to the bonds on the ground either of *inadequacy of the price paid for the same*, or for the reason that it occupied such a quasi trust relation to the pledgor as to disqualify it from purchasing at a sale made for its own benefit."

As the Court will have observed from the authorities cited, all except *Keystone Nat. Bank v. Palos Coal Co.*, 43 So., 570, *supra*, arose under conditions similar to those which, for the purpose of the argument, we have assumed will exist here, namely that the security had been sold and other bondholders of the same issue were objecting to the equal participation of the holders of the bonds of whose disposal they were complaining. Yet, upon the argument below, the only response made to the propositions which we are here advancing, was that, whereas, as general propositions they may be correct, they have no application after a foreclosure and sale, as the result of which it has been determined that the security will prove insufficient to pay all of the bonds in full and, therefore, has demonstrated that those situated as are the intervenors will suffer. Although, heretofore, we have somewhat considered the results to which such an argument leads, it now occurs to us to add that whereas, of course, the intervenors could not complain if their claims were paid in full, that circumstance bears no essential relation to the question as to whether or not they have rights outside of their contracts, which, in our view, is the fundamental portion of the question which we are now considering. Indeed, unless the transaction were void *per se*, or was made with express intent to defraud them, the discussion already had discloses that the intervenors are not in a position to question its results. Such being the case, the principle involved cannot be affected by the circumstance that the issues are made subsequent or prior to insolvency, especially if, as in the *Keystone Bank* case, the bill alleges that the companies' assets are insufficient to pay its debts, which fact was admitted by the demurrer to the bill.

In order to sustain the proposition that the question is

affected in any degree by the matter of the ability or inability of the mortgagor to pay all of the bonds, must we not go to the point of concluding that, regardless of the provisions of the contract under which the intervenors took their bonds and of the performance thereof by the mortgagor, they may assert rights which, primarily, concern only the corporation and its stockholders, provided it be shown that their security is insufficient, which is the very point decided adversely to such contention in the Keystone case. And if that proposition be conceded, must it not necessarily result in making a new contract between the parties, namely, in adding a provision to the mortgage that, despite the covenants to the effect that additional bonds may be issued when the required additional security has been placed under the lien of the mortgage, such covenant does not apply if and when the corporation becomes insolvent. If any such principle be established, where will it end? Will it not render uncertain the rights and interests of mortgage bondholders to such an extent that no one will feel justified in purchasing such securities in reliance upon the provisions of a mortgage.

In considering the intervenors proceeding one to exclude the 718 bonds from any share in the distribution of the proceeds of the foreclosure sale, must we not, in order to sustain their contentions, also assume both that, had the bonds not been exchanged for the second mortgage bonds, they would have been in the treasury when the Receiver was appointed, and that, so situated, they would not have been entitled to participate in the distribution of such proceeds. So far as the first of these suggestions is concerned, it will be recalled that the Receiver of the Power Company was not appointed until December, 1913, fifteen months and one year following the respective transactions. In view of the fact that, in face of the competition which became effective in January, 1913, the company was sustained as a going concern, during the time mentioned, despite its inability to pay the interest on its first mortgage bonds on April 1, 1913, little room is left for the assumption that the 718 bonds would have been in the Power Company's possession when the Receiver was appointed, because, until the officers and directors of the company finally determined that it was useless to further prolong its struggle against adverse conditions, it would have been their duty to utilize its resources for the purpose of maintain-

ing it, which, indeed, is all that was done; and had the bonds been sold, is there any evidence before the court that the proceeds of such sale would or could have been ~~presented~~ ^{utilized} so as to have provided adequate security for the intervenors' and for the 718 bonds, or even that the improvement of the security, evidenced by the additions and betterments, as shown by the company's balance sheet, during the last three months of 1912, would have been realized? Indeed, is it not wholly probable that such proceeds would have been utilized in paying interest on all outstanding bonds and, as were the resources subsequently obtained, largely, if not wholly, consumed in waging the battle of competition which began in January, 1913. Whatever else may be said on this subject, however, surely in considering it, we enter the realm of speculation and cease to deal with facts.

The fact that the intervenors' contention also necessarily leads to the assumption that, had the bonds been in the Power Company's possession when the Receiver was appointed, they would not be entitled to be admitted to distribution, presents a much more serious question and one which under such circumstances as those existing here, it appears to us would be resolved against the intervenors.

Thus, the record shows that, during the years 1908 and 1912, inclusive, "the Power Company had no other source of income or revenue from which expenditures could be made in ^{retiring} underlying bonds, purchasing properties or making additions, enlargements, etc., to its plants and properties, *than the proceeds of earnings and of second mortgage bonds*, where the expenditures were not originally made in the first instance from the proceeds of the first mortgage bonds" (p. 432). Such was the testimony of Mr. Markhus, who was the company's general manager during the entire period mentioned. So far as the exception mentioned in his statement is concerned, it is of little consequence in considering the additions to the security of the bondholders which are represented by the 718 bonds, because all bonds previously issued were for purposes specifically prescribed by the mortgage. It follows, therefore, that all of the property, ^{by such bonds} plants, additions, betterments and improvements, represented ^{by such bonds} so far as retirement of liens upon underlying properties and the acquisition of

new properties are concerned, and, to the extent of 90 per cent. thereof, so far as expenditures for betterments and improvements are concerned, were acquired and made through the use of the company's earnings or from the proceeds of its second mortgage bonds. In other words, neither the intervenors nor any other first mortgage bondholder, except the Railway Company ~~and its assignors, and the company's stockholders,~~ contributed one dollar of the more than \$800,000 represented by the 718 bonds. Under such circumstances, does it offend the conscience of a court of equity to suggest that those whose moneys have thus enhanced the value of the mortgage security, shall be protected in the distribution of the proceeds thereof? And how may they be protected, unless, if the bonds, duly issued and certified, are held by the mortgagor at the time of its insolvency, the mortgagor receives the distributive portion of such bonds for the benefit of the second mortgage bondholders, general creditors or stockholders, as their interests may appear. Unless this question receives an affirmative answer, can equity be done in such a situation?

Can these intervenors make any other answer to such proposition except to say that "it is true that your moneys have been expended to the extent of more than \$800,000, which expenditures redound directly to the enhancement of our security, but you are entitled to no consideration for such expenditures, because neither our contracts with the mortgagor nor your contracts with the mortgagor provide that, if bonds, issued against expenditures made by the second mortgage bondholders and others, are not sold by the company, regardless of the price realized, you shall have no benefit from such expenditures but all of them must be held solely for our benefit?"

Does it lie in the mouth of those who say, ^{that} regardless of the provisions of their contract, they are appealing in the broadest scope to a court of equity, to take such a position ^{as that?}

As we have before mentioned, provisions in mortgages of the character of those here under discussion are quite modern and questions such as that which we are now considering have not, therefore, apparently been presented for judicial determination. We are frank to say, therefore, that, although we

consider the contention absolutely sound as a matter of principal, we have been able to find only one reported case which appears to sustain it. We have, however, found no case to the contrary.

A case apparently in point is the *Trust Company of America v. United Boxboard Company*, decided by the Appellate Division, First Department of the New York Supreme Court, in June, 1914, and ~~being~~ reported in 162 App. Div., 855.

There, pursuant to the provisions of a mortgage made by the predecessor of the defendant company, bonds, secured by such mortgage, were to be issued upon the delivery to the trustee thereunder of stock of the American Straw Board Company, in the proportion of \$1,000 of bonds for each \$3,300 par value of stock so deposited. "The mortgage provided that for all purposes, including the right to deposit stock and receive bonds therefor, the mortgagor's rights should appertain to its successors and assigns." Within a short time following the issuance of the mortgage, the trustee certified and issued bonds to the extent of \$1,302,400. In 1908, two years following the making of the mortgage, Receivers of the mortgagor company were appointed who sold all of its assets to a reorganization committee, in consideration of the assumption and payment of all of the obligations of the mortgagor company, except its obligation upon the bonds secured by the mortgage. It was expressly provided in the order authorizing such sale that the committee or its nominee "should have the same right to the certification, delivery and use of the bonds to be issued under such collateral trust mortgage as the United Box Board and Paper Company (the mortgagor) had theretofore had, but upon the terms and conditions of said mortgage." The reorganization committee organized the defendant company and designated it as its nominee to whom the assets of the mortgagor company should be transferred, and they were accordingly so transferred. Among the assets thus received by the defendant were \$330,000 par value of the stock of the American Straw Board Company, which it deposited with the trustee under the mortgage in question and for which it received in exchange, bonds duly certified to the amount of \$100,000. In 1911, the action was brought to foreclose the mortgage, which then covered 46,280 shares of

American Straw Board Company stock, of which 42,980 had been deposited "by the original mortgagor company and 3,300 by this defendant." The stock was sold upon foreclosure for \$250,000. The court below had found, as a matter of fact, that all of the bonds certified by the trustee were outstanding in the hands of holders for value, except \$16,000 thereof, which remained in the treasury of the defendant. The court said (p. 857):

"The present controversy is over the right of defendant to participate *pro rata* in the balance of the purchase price on account of the \$16,000 of bonds held by it. * * * It is stated, and without verifying the computation we assume it to be a fact, that the precise sums ordered to be allowed to the purchasers for the bonds held by them were calculated upon the assumption that this \$16,000 of bonds were not entitled to participate in the proceeds of the sale. *If this be so it is due undoubtedly to a mistake as to the status of those bonds.*"

After discussing whether or not the application rendered necessary the amendment or alteration of the judgment which determined the number of bonds entitled to share in distribution, which excluded the \$16,000 thereof under consideration, and determining that, so far as moneys remained undistributed, it had the right, if they were entitled, to admit the \$16,000 of bonds to participation in such distribution, the court further said:

"So far as concerns the \$16,000 of bonds in question, we can see no reason why they are not entitled to participate in the distribution. They were duly certified and issued by the trustee against stock deposited in strict conformity with the mortgage, and the stock against which *they were issued was a part of the stock which was sold in foreclosure and thereby contributed pro tanto to the creation of the fund to be distributed. They became valid obligations under the mortgage when they were certified and issued by the trustee, and their validity is in nowise affected by the circumstance that defend-*

ant, after it had lawfully acquired them, kept them in its own treasury, instead of selling them to some one else."

Applying the language of the opinion to the case at bar, *mutatis mutandis*, the 718 bonds were duly certified and issued by the trustee against the discharge of underlying obligations, the acquisition of additional plants and property and against 90 per cent. of sums expended by the mortgagor for betterments and improvements, all in strict conformity with the mortgage; and the properties thus discharged of lien, thus acquired and thus added to the security of the mortgage lien, and against which they were issued, are a part of the property which will be sold in foreclosure and will thereby contribute *pro tanto* to the creation of the fund to be distributed. Within the terms of the decision, did they not, therefore, become valid obligations under the mortgage when they were certified and issued by the trustee, and would their validity in any wise be affected by the circumstance that, after it had lawfully acquired them, the company had kept them in its own treasury instead of selling them to someone else?

It will be observed that, in the case last mentioned, the court appeared to consider that the defendant company there had been substituted in all respects for the mortgagor company, and seems to dispose of the question upon principle rather than upon consideration of the circumstance that the defendant company had succeeded to all of the rights and interests of the mortgagor company, including the right to the certification, delivery and use of bonds issued under the mortgage, which the mortgagor company theretofore had; and that view of the matter appears to sustain absolutely the proposition for which we are now contending.

The order of the Appellate Division was, under date of January 5, 1915, reversed by the New York Court of Appeals, the case not yet being reported. We have procured a copy of the opinion, however, and find that the reversal proceeds upon the legal proposition that, since the judgment of foreclosure determined the number of the bonds outstanding under the mortgage, which number excluded "bonds in treasury \$16,000," so long as the judgment stood unreversed or unamended, the Appellate Division was without power to

admit the \$16,000 of bonds to distribution, which conclusion would appear to be correct. The Court of Appeals does not, however, contest the correctness of the Appellate Division's conclusions with respect to the legal right of the \$16,000 of bonds to participate and, indeed, at an early part of the opinion, says :

“To determine its force and effect, it is necessary to ascertain precisely what, if anything, was adjudicated by the judgment proper in the action with respect to the said \$16,000 of bonds. We shall assume now that the record disclosed, as a matter of fact, *that these bonds were entitled to share in the proceeds of the sale.*”

In order that this Court may be fully advised in the premises, we are taking the liberty of handing up to each of the Judges a copy of the opinion of the New York Court of Appeals.

We have given the report of the case very fully, in order that the Court itself may determine if it is in point upon the question under discussion. We recognize the possibility of distinction because of the fact that the defendant was not the mortgagor Company and may, therefore, have been considered to substantially be in the position of one purchasing the bonds for the deposited stock. The case as reported, however, gives no suggestion that the Court was affected by any such consideration. On the contrary, the entire presentation of facts and discussion suggest strongly to us that the Court considered and intended to dispose of the issue with respect to the right of the \$16,000 of bonds to participate as though the defendant were the mortgagor Company.

We submit most earnestly, therefore, that upon principle, supported by an abundance of authority, the Intervenor is shown to have no interest whatsoever in seeking to avoid the transactions between the Power Company and the Railway Company ; and, upon principle, and what appears to be authority, that the 718 bonds, if in possession of the Power Company's Receiver, would have been admitted to participation upon distribution, in which event, of course, all of the contentions of the Intervenor fail, because, were

the transaction rescinded *in toto*, their positions would not be changed. We would add, however, a word more to the discussion : Since, obviously, none of the 718 bonds are a part of the \$500,000 authorized to be delivered by the Trustee at the time of the completion of the mortgage, nor a part of the \$2,000,000 thereof authorized to be used in connection with the Company's Ox Bow development, as the General Manager testified, the property against which they were issued could not have been acquired by the mortgagor with the proceeds of the First Mortgage Bonds held by the intervenors and others, the aggregate of which is, as the record shows, \$2,544,000. In addition to that self-evident proposition, the testimony of the General Manager shows that, as a matter of fact, part of the moneys utilized to retire the underlying bonds, to acquire the additional plants and properties and to make the improvements, additions and betterments, represented by the 718 bonds, came from the Company's earnings and part from the proceeds of the sale of the Second Mortgage Bonds. Such being the situation, where do the abstract equities lie ? If, as we contend is the case upon principle and, apparently, upon authority, the bonds became the Power Company's absolute property when they were certified and delivered to it, abstract equity would require that they be utilized to restore to the Second Mortgage bondholders and to the stockholders that which they have contributed to the enhancement of the security. Although we have found no authority applying the principle of subrogation to such a situation, why should it not be so applied by a court of equity ? Under conditions which render possible such a situation, a just provision to insert in first mortgages and in second mortgages would be that all first mortgage bonds issued against property acquired through the use of funds obtained from second mortgage bonds, should be deposited as additional security under the second mortgage ; and, if that result be just and equitable, with the 718 bonds still in the possession of the Power Company, why should not such result be accomplished by permitting the bonds to participate upon distribution for the benefit of the second mortgage bondholders, in which event, as before observed, with the exception of the 166 bonds now in the hands of the public and \$30,000 thereof held by the Bates & Rogers Construction

Company (p. 260), such distributive share will be paid to the Railway Company.

We do not enlarge upon this phase of the question, because it deals only with a supposed condition and, in our view, is unnecessary for the purpose of determining the issues adversely to the intervenors. It is submitted, however, that modern authorities go to the point of establishing that the right of subrogation is not dependent upon a relationship of principal and surety, or of any other situation whereby, under some contract provisions, one is liable for the obligation of another, but extends to any situation where, in the view of a court of equity, the property of one has been or will be taken to pay the obligation of another under circumstances which will result inequitably to him whose property is or will be so taken, ^{unless he} shall be permitted to succeed to or participate in the rights of those who have been benefited thereby.

Thus, in *Pease v. Eagan*, 131 N. Y., 262, the general principle involved is stated as follows :

“ No contract is necessary upon which to base a right of subrogation ; it is founded upon genreal equitable principles, and may be asserted by one who has no absolute interest in property, but who, upon the happening of a contingency, may become the owner, and who in order to save the property, pays the debt which is a lien thereon.”

Although here, the debt was not paid, the money of the Second Mortgage bondholders was used to build up the security of the First Mortgage bondholders, under the terms of a contract between the mortgagor and the First Mortgage bondholders, known to the Second Mortgage bondholders, pursuant to which, the Company could reimburse itself for such expenditures and, therefore, protect the Second Mortgage bondholders, either by taking out bonds under the mortgage and, as we contend, holding them in its possession, or, as is obvious from the authorities cited, by depositing them as additional security under the Second Mortgage. As, in substance, the latter is what has here taken place, not only, in their last

analyses, do the transactions not offend the principles of equity, but they merely accomplish for the Second Mortgage bondholders what, had the exchanges of bonds not been made, equity should have accomplished for them.

VI.

Upon the theory of rescission, which the court adopted, it was error to confine the right of the Railway Company as pledgee to 440 first mortgage bonds ; and to limit to \$110,000, the obligations for which they can be held (Supplementary decision, pp. 153, 154).

Taking up first the number of bonds subjected to the Railway Company's lien, we assume that the theory of the lower court in charging them only upon the 440 bonds was that Mr. Hendee testified that such number were deposited by the Power Company as security for the \$250,000 of notes. If, however, the transactions between the Power Company and the Railway Company are not sustained *in toto*, it will be because the court will ignore the actual terms of the agreements and hold, not that they mean what they say, but that they were mere subterfuges whereby, so far as the September arrangement was concerned, in consideration of the advance by the Railway Company of \$250,000, or of \$110,000, the Railway Company obtained what purported to be title to \$500,000 of bonds ; and, in connection with the December arrangement, obtained what purported to be title to \$218,000 of bonds. In other words, the court will disregard the agreements made by the parties and hold that the transactions thereunder will be upheld only in so far as may be necessary for the protection of the Railway Company to the extent of the moneys, or other consideration, actually advanced. It is grossly inequitable, therefore, for the Court to confine the Railway Company to the terms of the contract, so

far as the parties made a record of the bonds* actually delivered in pledge, but to repudiate the contract for all other purposes, and, thereupon, afford the Railway Company relief, only upon the theory that, since the Interveners seek equity, they must do equity.

The evidence shows that, so far as the exchanges of bonds are concerned, no discrimination was made in utilizing the first mortgage bonds originally deposited as security for the notes. It would seem only proper, therefore, to consider that, since the parties undoubtedly intended to carry out the contracts in accordance with their terms, when the acts were performed by which the actual exchanges were accomplished, they did what would be usual under such circumstances, and, accordingly, that they intended to first complete the exchanges under the first contract and then to complete the exchanges under the second contract. We can, therefore, find no justification whatsoever in the evidence for any discrimination between the bonds acquired under the two contracts, except that evidenced by their terms, the earlier of which limited the exchanges thereunder to \$500,000 of bonds (See Contracts ; also Record, page 259.)

Passing now to the justification for limiting the rights of the Railway Company to the recovery of \$110,000, without prolonging the discussion by referring *in extenso* to the views of the learned Trial Court, it is obvious that it was influenced to that result by concluding that Messrs. Kissel, Kinnicutt & Company, the Syndicate and the Railway Company are but different terms for the same legal entity, and that, accordingly, the Railway Company was obligated to purchase the remaining Second Mortgage Bonds under the contract of September 19, 1911, between the Power Company the Messrs. Mainland and Kissel, Kinnicutt & Company. What may be the justification for this conclusion on the Court's part, we are unable to understand. The only evidence on the subject contained in the record will be found at pages 195 to 197. Summarized, it is that, *after the contract of September 19, 1911, was made, "a syndicate was formed to take over the holdings of Kissel, Kinnicutt & Company in the Power Company, and in other properties which they had acquired and which later became the properties of the Railway Company."* Thereupon, the general nature of the Syndicate's holdings and

the manner in which the stock relationship between the Railway Company and the Power Company was established are stated, and further explanation with respect to the Syndicate is made as follows: It was composed of from 50 to 100 individuals who resided in various parts of the country, each member of which had a stated participation. It was not a bond syndicate, but a "construction syndicate." Messrs. Kissel, Kinnicutt & Company were the Syndicate Managers and, although that firm did not have the largest financial interest, it was, otherwise, the principal interest. Such is the entire record on the subject. Does it necessarily lead to, or does it even justify, the conclusion that the obligations of Messrs. Kissel, Kinnicutt & Company under the contract of September, 1911, were in any sense turned over to the Syndicate, much less to the Railway Company?

The record discloses also that the Railway Company began business about January, 1912, more than three months after the contract of September, 1911, was made. There is no evidence whatsoever that the contract was turned over to the Syndicate or that it was turned over to the Railway Company, the only other material evidence on the subject being that the securities taken by the Bankers under their contract were eventually turned over by them to the Railway Company. In the absence of affirmative and positive evidence to that effect, can it be justifiably held that such circumstance alone imposed upon the Railway Company all of the obligations assumed by the Bankers under the contract? If so, upon what principle of law does the conclusion rest?

It may very readily be that the Bankers made an arrangement with the Syndicate or with the Railway Company, or both, that as they acquired securities under their contract such securities would be turned over to the Syndicate, or to the Railway Company, and that the Bankers would accept in payment therefor specified securities of the Railway Company. Clearly, however, such an arrangement would not result in an assignment by the Bankers of all of their rights under the contract and an assumption by the assignee of all of the obligations imposed upon them thereby. And in the absence of such an assignment and of such an assumption, it is most earnestly and confidently contended that no justification exists for a finding to that effect.

If these Intervenor^s are to deprive the Railway Company of rights which, otherwise, it would have under existing conditions, because it assumed the obligations of the Bankers under the contract, do not they take up the burden of proving by affirmative and persuasive evidence that the conditions existed which alone will justify such a result? It seems to us that there can be but one answer to such inquiries and that, clearly, the record here does not contain facts such as will justify the conclusion that such a situation had been created. We do not enlarge upon the discussion, because we are unwilling to prolong this brief unnecessarily, and the proposition appears to us to be so wholly obvious.

Assuming, however, that the Court was correct in its assumption in this regard, there is left for consideration the correctness of its conclusions that the Railway Company is entitled to recover only \$110,000, instead of the \$250,000 which it advanced. The Court below substantially says that the transactions in question should be avoided because the Power Company was insolvent and they were had for the purpose of hindering, delaying and defrauding these Intervenor^s, yet it seeks to deprive the Railway Company of \$140,000, because it holds that the Railway Company should, under the contract of September, 1911, have placed that sum in the treasury of the Power Company, and have taken therefor Second Mortgage bonds, which it holds were then worthless and known so to be by the parties to the transaction. Does not the mere statement of the proposition shock one's sense of equity?

Can it be justly held that these transactions were fraudulent as to the Intervenor^s because the Power Company was insolvent and in the same breath that the Railway Company will be held to ^aits contract to purchase securities which, if such insolvency existed, were, as the Court finds, worthless? If they were worthless, the Power Company was unable to perform its contract, in that it was unable to deliver to the Railway Company anything of value; and under what principle of law shall a court of equity hold a party to the performance of a contract, when the entire consideration to be given by the other party has wholly and absolutely failed?

Fortunately, as we have before shown, we are not without authority to gainsay so unusual a proposition. Thus, in

Benedict v. Field, 16 N. Y., 595, a portion of the syllabus is as follows :

“ Upon an executory contract for the delivery of goods, sold for payment, upon such delivery, in the notes of a third party, who becomes insolvent between the time of the contract and that stipulated for its performance, *the seller is not bound to deliver upon a tender of notes, though they are not entirely worthless.*”

And, the Court, per COMSTOCK, J., said :

“ The defendant was not bound to part with his property and accept in payment the notes of an insolvent firm, such insolvency having occurred, or at least having been ascertained, after the sale and before the time of delivery. * * * It is true that the sale, looking only at the precise letter of the contract, *was not defeasible in the event which occurred.* But when the parties contracted, the firm of Leggett Brothers was in good credit and was supposed to be solvent. Their notes were to be accepted as payment, but the ability of that firm to give good notes was assumed, and was really the consideration of the defendant's engagement to sell and deliver the goods. * * *

“ The analogies to be derived from the law of stoppage *in transitu* are perhaps not perfect, but they are, I think, sufficiently near to furnish a rule for the present case.”

In *Bruce v. Burr*, 5 Daly (N. Y.), 510; aff'd 67 N. Y., 237, defendants, in consideration of the delivery to them of the note of a third party, agreed to sell and deliver to the plaintiffs certain books. *After a portion of the books had been delivered*, the defendants learned that the maker of the note was insolvent and they refused to make further deliveries. Held, that the consideration of the contract having failed, the defendants were justified in refusing to deliver. The General Term said :

“ The contract, though executed as to the goods already delivered, *was executory as to the goods there-*

after to be ordered. The consideration of said contract had entirely failed, and the defendants, *already at a loss on this account*, had a right to protect themselves against any further damage."

It is even held that, where the parties have executed the contract in mutual ignorance of facts which render the consideration valueless, equity will give a remedy on the ground of mutual mistake of fact. Thus, in *Harris v. Hanover National Bank*, 15 Fed., 786, the plaintiffs, who were the owners of a note of a New Orleans firm, sold the same, through note brokers, to the defendant in New York. An hour before the sale, an attachment, upon which their establishment was seized, was issued against the makers of the note by local creditors. Neither the defendant, nor the plaintiffs, nor the note brokers knew of the attachment at that time. The money received by the note brokers from the defendant having been paid into Court, it was held that the defendant might recover it.

The Court (COXE, J.), said :

"The almost unbroken line of authority seems to establish the doctrine that if bills of a broken bank, or the notes of a party who has previously failed, are transferred in payment of a debt, both parties being ignorant of the failure and innocent of fraud, the creditor may repudiate the payment, upon a tender or return of the dishonored note, and recover the amount due" (Citations). "It is true that in many of these cases the debased or worthless paper was given in payment of a pre-existing debt, while in the case at bar the delivery was the result of a bargain and sale. * * * Yet, upon an analysis of the reason upon which these decisions are based—viz., mutual mistake—it is not easy to discover any difference in principle."

To the same effect is *Roberts v. Fisher*, 43 N. Y., 159. There, defendants, being indebted to plaintiff for goods sold, gave him the note of a third person, which he received in full payment and discharge of the debt. The maker of the note was insolvent at the time, but this fact was not known to either the defendants or the plaintiff. Held, that the plaintiff

might recover from defendants his original claim against them. The Court, per PECKHAM, J., said :

“Upon broad principles of justice, it would seem that a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be good.”

That insolvency discharges the other party to a contract is also held in *Ex parte Chalmers*, L. R., 8 Ch., 289, where MELISH, L. J., speaking for the court with reference to a sale to one who became insolvent after the contract was made, said :

“I am of opinion that the result of the authorities is this : that in such a case the seller, *notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract, until the price of the goods is tendered to him.*”

See, also,

Thomas v. Westchester Co. Supervisors, 115 N. Y., 47.
Stewart v. Orvis, 47 How., Pr. (N. Y.), 519.

Most earnestly we submit, therefore, that under the conditions assumed by the learned Trial Court, both upon principle and authority, neither the Bankers, nor the Syndicate, nor the Railway Company, assuming the latter to have taken over the obligations of the Bankers thereunder, were, because of the contract of September, 1911, under any legal responsibility to purchase the additional \$175,000 of second mortgage bonds and to pay therefor \$140,000. Must it not follow, therefore, that, to the extent that the court below required the completion of the performance of that contract as a condition to any relief to the Railway Company, it imposed an obligation which the law would not have imposed and one which, accordingly, cannot be sustained?

The only alternative to the last-mentioned proposition is that the Power Company was not insolvent, that, accordingly, its second mortgage bonds were not worthless and, therefore, that the Bankers or the syndicate or the Railway Company were not relieved from completing performance of the contract. If that horn of the dilemma be taken by the Interveners, does it not follow that everything which was done evidences an intention to continue the business of the Power Company? And if such be the case, who will say that the

parties to these transactions did not then consider the second mortgage bonds to possess substantial value? And if they possessed substantial value, or the parties then so believed, such value was a consideration for the contracts of September and December, 1912, in addition, in the case of the September contract, to the \$250,000 advanced thereunder, and, in the case of the December contract, to the obligations from which the Power Company was relieved, the obligation assumed by the Railway Company to purchase \$25,000 of Power Company second mortgage bonds, and the value, or assumed value, of the 50 shares of preferred and of the 100 shares of its common stock issued and delivered to Bates & Rogers Construction Company, in connection with the performance thereof. If such were the case, the final questions are merely those relating to sufficiency of consideration. And, in view of the then deficit in the Power Company's earnings, and its consequent inability to borrow elsewhere or to sell its bonds in the market, upon what principle of law or equity can it be concluded that the considerations received by the Power Company were so grossly inadequate as to shock the conscience. (See to)

We do not apologize for the length of the brief, because we consider of vast importance every case where men are charged with having committed fraud; in addition to which, the financial considerations here involved are sufficient to justify every possible effort on the part of counsel to aid the court in reaching correct conclusions. The brief has, however, been formulated under conditions of time and opportunity so restricted that it has been necessary to prepare it in great haste; and we are entirely sensible that, as a result, it lacks much of the orderly arrangement and coherency of discussion which should obtain in presenting one's written views to an appellate court. That result we regret sincerely, but time has left no alternative.

It is most earnestly submitted that the decree below, so far as it concerns the 718 bonds, should be reversed *in toto*, with costs to the appellants.

Respectfully submitted,

ELDON BISBEE,

Amicus Curiae.

C.

In the last analysis, the last consideration is, of course, of no importance, because, if the company was not insolvent, it was competent to contract with the Railway Company in any manner which it saw fit, providing that the Railway Company in making the contract, had no intention of hindering, delaying and defrauding the intervenors.

As bearing upon the injustice of thus depriving the Railway Company of \$140,000, we again call attention to the terms of the contract (intervenors Ex.3), authorized by the Executive Committee of the Power Company on September 27, 1912, which, after reciting that three of the parties thereto were also parties to the original contract of September 19, 1911, the performance thereof in certain respects, the fact that changed condition had rendered it advisable to substitute certain considerations for those originally contemplated by the parties, that the Bankers had, for a valuable consideration, "been released from their obligation to purchase said \$175,000 face value of said bonds", and that "the Bankers have been required from various causes in connection with the transaction contemplated" by said contract September 1911" and have from time to time, advanced far more money than was originally contemplated in said contract" and have otherwise assisted beyond contract obligations in carrying out the spirit of said contract. (pp.250-256).

It thus appears from the corporate records, authenticated by the controlling votes of the Messrs. Mainland, the intervenors witnesses, that the parties then conceded that, although the balance of the second mortgage bonds had not been purchased, as a matter of fact, the Bankers had advanced to the Company more money than originally contemplated and, otherwise, had gone beyond their contract obligation, in assisting the Company.

United States
Circuit Court of Appeals

For the Ninth Circuit.

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY,
LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of
IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B.
CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES,
EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD, Per-
sonally and as a Bondholders Committee, W. J. FERRIS, as Receiver of
IDAHO-OREGON LIGHT & POWER COMPANY, UNITED STATES
OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL
ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFAC-
TURING COMPANY, A. H. SUNDLES and AMERICAN STEEL &
WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES,
EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R.
ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE
and CHARLES M. SMITH, Interveners, and Being a Protective Com-
mittee for the Holders of the First and Refunding Bonds of the IDAHO-
OREGON LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS,
Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY,
IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS,
Its Receiver, BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED
STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GEN-
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STEEL & WIRE COMPANY,

Cross-Appellees.

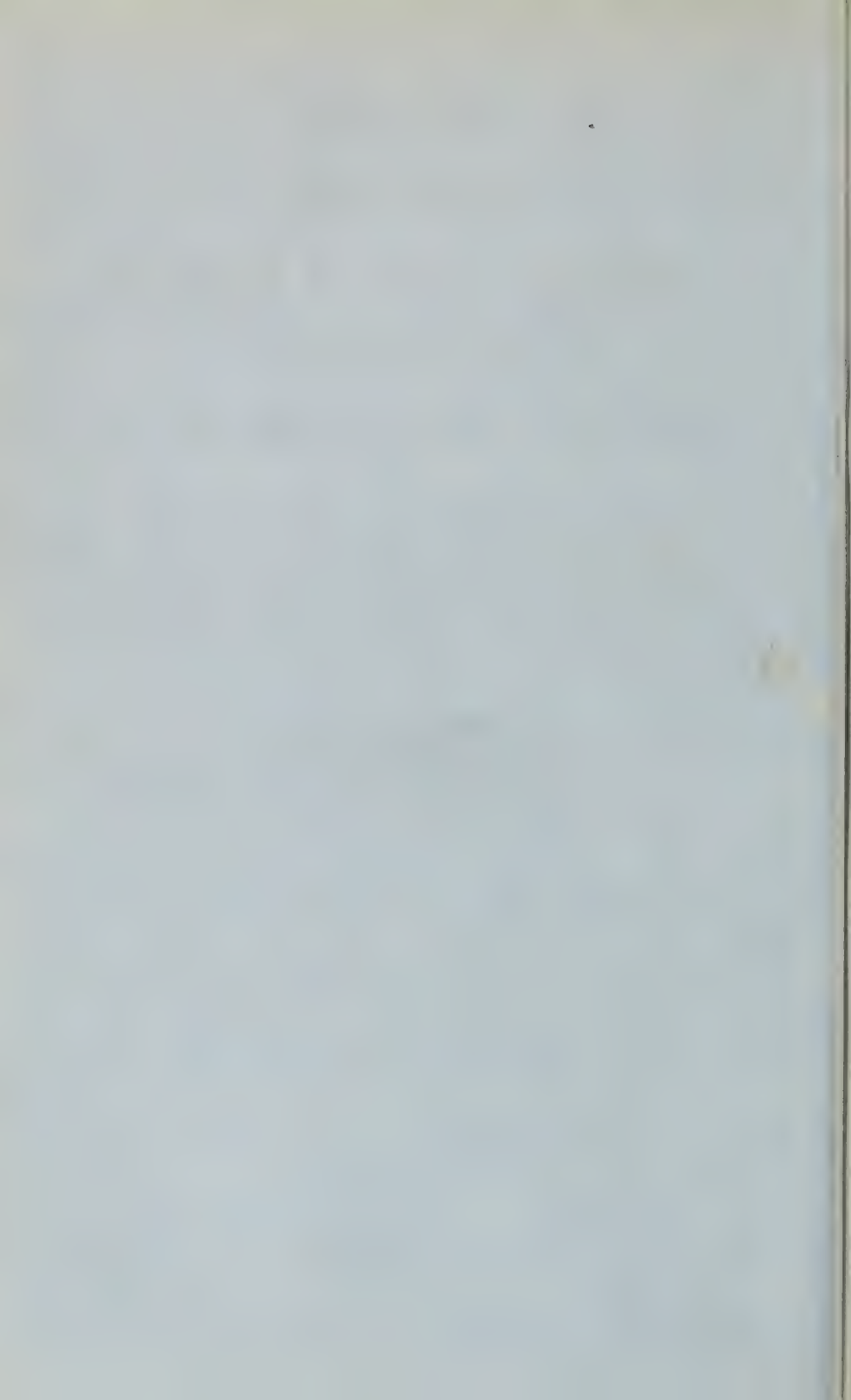
BRIEF OF APPELLANTS AND CROSS-APPELLEES.

*Upon Appeal and Cross-Appeal from the United States
District Court for the District of Idaho, Southern
Division.*

CAVANAUGH, BLAKE & MacLANE,
Solicitors for Appellants.

JOHN F. MacLANE, of Counsel.

Filed
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F. D. Monckton,
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*United States Circuit Court of Appeals for the Ninth
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Cross-Appellees.

Answering Brief of Appellants and Cross-Appellees.

The appellees and cross-appellants have discussed their case in a single brief, filed as an answering brief, and assuming that the present record embraces, without distinction, and as applicable to both the appeal and cross-appeal, evidence excluded as well as that admitted and made the basis of the decree appealed from. To answer the brief, so far as it presents the cross-appeal, therefore, requires some reiteration of ground already covered.

It is probably unwise to try cases on stipulation, assuming the record to be other than it is, for such course is liable to lead, as it has done here, to disagreement as to the questions actually involved. The assumption on which the decree was entered, to which we consented and now consent, is set forth on page 49 of our original brief, and is commented upon on page 109 thereof. We did not feel, in so consenting, that we changed the issues as framed by the Court's order of September 19, 1913 (App. Brief, pp. 14-15; Record, pp. 55-59), nor opened a different theory, than that stated by the bill in intervention, for attacking the transactions in question. We assumed, and we think correctly, that the effect of the stipulation (which was made after the hearing) was to present the case as if (a) the proceeds of the sale were in court; (b) the Railway Company had presented its bonds—thus establishing *prima facie* its right to distribution; (c) the interveners had filed the bill here filed objecting to such distribution; (d) the court had framed the issues; (e) the Railway

Company had filed its present answer, and (f) the evidence here taken was before the court.

The issue thus framed is embraced in paragraph XIII of the bill in intervention, quoted on pages 12, 13 of our brief, in which it is alleged that the Railway Company being in control of the Power Company, procured from it 718 first mortgage bonds, in exchange for worthless second mortgage bonds, and therefore without consideration. This was the only issue which the Railway Company was required to meet, and it sought to meet it by showing: (a) that the bonds in question were available to the Power Company as against other bondholders for any lawful corporate purpose; (b) that the Power Company disposed of them by valid corporate action; (c) that if additional consideration to the surrender of second mortgage bonds were necessary, it was afforded by the advancement of \$250,000, and by the settlement of the Bates and Rogers obligation of the Power Company.

The trial proceeded upon these lines. The Railway Company sought to establish the three propositions above stated. The interveners' evidence was all directed to the points that there was no valid corporate action, and that the bonds were not only available to the corporation, but were valuable corporate assets, and should have been sold for much more than the Railway Company paid for them, and, therefore, that their disposal to the Railway Company at the price paid by it was unauthorized and fraudulent as against the company, and that other bondholders

should have the same right to avoid the transaction, and on the same grounds, as the company.

1. *The Question of Preference.*

It is now urged that at the time of the questioned transactions, the Power Company was insolvent; that the transactions constituted a preference to the directors (through their interest in the Railway Company), and that the other bondholders as creditors are here in their own right avoiding such preference, or resisting its enforcement.

We do not think that this theory is properly before the court. It is not suggested either by the bill, the evidence or the decree, though it is mentioned in the reasoning of the District Judge in his memorandum decision. We refer to these briefly.

(a) *The Bill.*—A very brief summary of the bill is given on pages 10 to 14 of appellants' brief and it is discussed on pages 107, 108. It is set forth at length at pages 5 to 47 of the Record. Certainly the allegation on which the issues were framed contains no intimation that the Power Company was insolvent or that the issue of these bonds constituted a preference. But going beyond this, the other allegations of the bill negative any such theory, and in effect allege that the Power Company was in fact in prosperous circumstances, if it could but be divorced from the Railway Company and its assets collected. (Record, pp. 8, 18, 19, 33, 34, 39, 41, 42.)

(b) *The Evidence.*—No evidence was offered or received to show that the Power Company was insolvent in the fall of 1912. The only evidence which would tend to support such conclusion was the finan-

cial statements on pages 219 to 229 of the Record. These were admitted, not to show insolvency, but “for the purpose of showing the status of the business of the Idaho-Oregon Company as bearing upon the real value of the bonds” (p. 219). In so far as counsel touched upon this question otherwise, his testimony was directed to show that those bonds could have been marketed for a substantial sum, and if so marketed would have put the company on a sound basis. (Record, pp. 323-349; Appellee’s Brief, pp. 115, 116.)

(c) *The Decree*.—The substance of the decree is given on pages 45 to 48 of appellant’s brief. It is commented on at page 108, and it is sufficient to refer to what is there said, to show that the decree does not proceed upon any theory of insolvency and preference, but upon that of rescission of a fraudulent intercompany transaction.

(d) His Honor’s decision, we think, was based upon what he knew of the present condition of the Power Company after it had been subjected for almost two years to drastic competition, and its estate had been involved for over a year in wasteful and disastrous litigation, which, if we may refer to excluded evidence frequently commented upon by the appellees, it was the purpose of the much criticised New York Committee to prevent.

(e) Appellees frequently refer to the “frank confessions” of insolvency and intent to prefer the Railway Company made by appellant’s counsel. Isolated statements of the brief may be subject to such construction, but we do not think that is a fair construc-

tion of our brief or argument as a whole which is directed toward the establishment of the critical condition of the company in its need for funds, and the approaching competition, which if honestly disclosed would have rendered the first mortgage bonds unsalable in ordinary markets. The Railway Company was maintaining the Power Company as a going concern, intended so to do, and was willing to purchase its securities for that purpose. It could then be foreseen that it might become necessary to foreclose or adjust the second mortgage; events rendered it impossible to prevent foreclosure of the first.

We therefore submit that the question of preferential payment or security of a director is not really involved in the issues. For that reason it was not discussed in the opening brief.

But assume evidence of insolvency under appropriate issues, there is no question of *preference* presented. All that the Railway Company, or the alleged preferred directors, are seeking is *participation* in the distribution of assets which its, or their, money have added to the common security, and in which, by the terms of the instrument creating such security, they are entitled to participate. If by these transactions the directors obtained a preference over *other* creditors (which in the principal brief we have endeavored to show was not the case—pp. 130–136), let such creditors complain. What the appellees here are resisting is not preference but *participation*, which they agreed in their bonds and mortgage junior creditors might have.

But is it the law that directors of an insolvent or

failing corporation cannot prefer themselves? Two Circuit Court cases by Justice Woods, decided in the '80's during the vogue of the trust fund doctrine, are cited in support of this position.

The Supreme Court of the United States in *Hollins vs. Brierfield Coal etc. Co.*, 150 U. S. 371, decided in 1893, explained and limited the trust fund doctrine, holding substantially that all that was meant thereby was that on winding up an insolvent corporation, its creditors are entitled to payment from its assets, in preference to stockholders. The Court said:

“Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.”

See, also, *Fogg vs. Blair*, 133 U. S. 534.

The Circuit Court of Appeals for the Eighth Circuit has expressly held that it is “established by persuasive and controlling authority that the insolvency of a corporation does not *ipso facto* transform its assets into a trust fund for the equal benefit of its creditors. * * * Such being the law, it follows that an insolvent corporation may, in the exercise of its *jus dispendendi*, prefer one creditor to another.” The Court then asks the question: “May it then prefer its own directors, if they happen to be creditors?”

And after careful discussion answers the question in the affirmative, so long as the debt is just.

American Exch. Bk. vs. Ward, 111 Fed. 782.

The Circuit Court of Appeals of the Sixth Circuit has reached the same conclusion.

Brown vs. Furniture Co., 58 Fed. 286.

In this case, the measure of the directors' duty is stated as follows: "The burden is on the preferred director of showing beyond question that he had a *bona fide* debt against the corporation." The Court further says: "Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer, among his creditors, his friends and relatives, so a corporation may prefer its friends."

We also cite, as containing a very full and illuminating discussion of this question,

Corey vs. Wadsworth, 118 Ala. 488, 44 L. R. A. 766.

And we commend to the Court for a most careful analysis of this whole question, with the reasons for the opposing doctrines, the text of

Jones, Insolvent and Failing Corporations,
pp. 141-160, secs. 126-134, inclusive.

We refer particularly to this work in lieu of further citation and discussion of primary authority, which we have not, at this writing, time to give.

2. *Avoidance and Rescission.*

Notwithstanding appellees' disclaimer—in view of the burdens which it would impose—of any succes-

sion to, or limitation by, the rights and duties of the corporation or stockholders, much of their brief is devoted to the question of avoidance of contracts between companies having common directors. The argument proceeds without difficulty, and in accordance with the doctrine announced in our brief, until the crucial point is reached in the assertion that a creditor may avoid such a contract on grounds available to the corporation or stockholders. (Appellees' Brief, pp. 99-104.) There it fails as a statement of what the law is, and becomes an essay as to what it should be, which, even as an essay, is inconvincing.

The cases cited have no relation to the subject.

In the case of *Washburne vs. Green*, the fraudulent director did not act under any form of corporate act or authority. He had no legal claim upon the bonds whatsoever. They were unissued bonds, for which no consideration had ever been given to the bondholders, in addition to property or otherwise, and the director, Richardson, attempted to procure title to them by a levy under an attachment. The Court held, being unissued, they were not subject to attachment, that Richardson acquired no title, and that by reason of his attempted fraud, he was not entitled to the rights of a salvor. The question of salvage is not involved in the case at bar at all.

Sweeney vs. Grape Sugar Company is the obvious case of a transfer to the controlling company of property otherwise available to the attacking creditor.

The case of *McGirky vs. Toledo R. Company* (cited p. 90) involves fraudulent car trusts, the participants in which endeavored to withdraw from the

operation of the after-acquired property clause of the mortgage cars and equipment which had been bought and paid for by the company. It was an attempted withdrawal of security from the mortgage. The mortgagee was the only person injured, and his injury was direct and apparent.

The true distinction is pointed out in *Mining Co. vs. Coosa Furnace Co.* (Appellants' Brief, pp. 80-82), where it is said that creditors are not entitled to disaffirm contracts on grounds available to the corporation or its stockholders, but that "The right of the creditor to impeach the transaction depends on its fraudulent character. The question in such case is, Was the transaction which is complained of entered into with intent to hinder, delay or defraud creditors?"

The question, then, of common directorate and constructive fraud inferred therefrom becomes immaterial under the law, and in view of appellees' apparent disclaimer of any derivative rights through the corporation, and we are reduced to the question of whether these transactions were actually fraudulent *against these interveners*. We are content with our argument on pages 85 to 106, 126-129, 136-137, of our principal brief, on this point.

3. *Assuming the Voidable Character of the Issue of the Bonds, to What Extent are They Enforceable?*

Here, we think, appellees join issue with us at the root of the case, and state their real position, and the position which, in one form or other, must be taken by the court to sustain any decree except that of full

ownership by the Railway Company of the questioned bonds. We call particular attention to pages 110 to 123, inclusive (subd. VIII) of appellees' brief, and some of the discussion at pages 123-132. There it is in substance asserted that these bonds are invalid against the other bondholders, represented by interveners, and cannot be enforced in any amount, except to the extent it is shown that the bondholders have been benefited, by additions to their security from the proceeds thereof.

If, on the other hand, these bonds so far belonged to the company as against the bondholders, by reason of the contract of mortgage and the considerations on which the bonds were certified, that the test or measure of their validity is benefit to the company and not to the bondholders, then it must follow that the bondholders have no interest in what the company got, and that the bonds are enforceable, except against objection by the company, or its privies, for their full face.

The principal brief of appellants maintains the affirmative of this latter proposition at length (see particularly, for summary, pp. 85-89), and we will not further discuss the question; except to say that appellees now come forth boldly, and assert that they are entitled to have their cake, and eat it too.

If, however, these bonds are to be condemned because they gave a preference, then they can only be condemned to the extent of such preference, that is, the excess of old consideration over new. The taking of security for the loan of \$250,000 new money was not a preference, and could not be under any

theory. Such security would be good even under the bankruptcy act.

Taking the other theory—that of the learned District Judge—that of benefit to the company, in new consideration, is the test of the enforceability of the bonds, we are content with the argument made in the principal brief, which we think appellees have failed to meet. The Railway Company advanced \$250,000, and committed itself to Bates and Rogers for \$20,000 additional for these bonds, and such liability cannot be offset by any unsatisfied liability of Kissel-Kinnicutt and Company to buy second mortgage bonds.

Even were it assumed that the Railway Company had succeeded to this liability, the fact would not prevent it from advancing money on first mortgage bonds, before satisfying its obligation to buy seconds, nor is there any rule against the release of the obligation to buy seconds, and substitution therefor of an obligation to loan money on, or to buy, firsts.

4. Errors in Evidence.

The answers to cross-appellants' assignments of error on the exclusion of evidence are: (1) The offered evidence was not within the issues as framed, and there is no assignment of error directed to the order framing the issues. (2) The evidence was not competent. Courts uniformly refuse to concern themselves with reorganization schemes, and were the rule otherwise, no evidence was offered that the scheme was conceived prior to March, 1913, long after the transactions in question, nor that the scheme was proposed or authorized by the Railway Company.

Were such the case, there is nothing to show that

the reorganization plan was good or bad, beneficial or otherwise, conceived in inequity or the dream of a philanthropist. All that would appear would be that certain individuals, interested in the Railway and Power Companies, proposed to reorganize them on the basis of consolidation of the two.

Personally, we think the evidence shows that some form of consolidation was the only logical way to treat the situation, and the only way in which the investment of the bondholders of either company could be made good.

SUMMARY.

In view of the divergent arguments of the original, answering and reply briefs, it will be convenient to summarize our position as follows:

I. As a bill by the bondholder to rescind or annul fraudulent acts of directors, on grounds available to the company, the suit cannot be maintained,—because

1. The transactions were at most voidable, and creditors have no right to avoid them on grounds open to the company, viz.: (a) Want of proper corporate authorization; (b) common directorate; (c) lack of benefit to the company.

2. Neither the company, nor its stockholders, nor any person in privity with or succeeding to it or them was injured by the transactions.

3. The company, its privies and successors in interest, have ratified the transactions, or at least would now be estopped to avoid them.

II. As an objection by bondholders in their own right to distribution to alleged fraudulent bonds, on

the ground of preference to directors, the bill must fail, because—

1. The bondholders have expressly contracted for such use of the bonds, and have received the very consideration, upon which they could be so used.

2. There is no law against directors preferring themselves.

3. The interveners have not objected to the transaction on the ground of preference.

4. The issue of the bonds did not give preference, but participation.

III. In any event or view of the case, the appellants are entitled to hold the entire 718 bonds, for

1. \$250,000 and interest.

2. \$20,000, the commitment to Bates and Rogers.

Without in any way impugning the motives or good faith of counsel, we suggest that their brief fails to distinguish between allegation, proof and inference, and confuses evidence admitted and excluded, and we respectfully suggest a careful reading of the statement of the evidence as contained in the record.

We repeat, that we think the decree erroneous.

Respectfully submitted,

CAVANAUGH, BLAKE & MacLANE,
Solicitors for Appellants and Cross-Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY, LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a Bondholders Committee, W. J. FERRIS, as Receiver of IDAHO-OREGON LIGHT & POWER COMPANY, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE and CHARLES M. SMITH, Interveners, and Being a Protective Committee for the Holders of the First and Refunding Bonds of the IDAHO-OREGON LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver, BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Cross-Appellees.

Reply Brief of Appellees and Cross-Appellants A. W. Priest, *et al*, Bondholders Protective Committee, to Brief of *Amicus Curiae*.

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

JOSEPH CUMMINS, Chicago, Illinois

RICHARDS & HAGA, Boise, Idaho,

Solicitors for A. W. Priest, *et al*.

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**Reply Brief of Appellees and Cross-Appellants A. W. Priest, et al,
Bondholders Protective Committee, to Brief of *Amicus Curiae*.**

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

The brief filed by *amicus curiae*, on the day of the hearing, is a bitterly partisan argument on behalf of the Railway Syndicate, who were named and described in the Bill in Intervention of the bondholders committee but who declined to submit themselves to the jurisdiction of the court and take the burden and responsibility of parties to the cause, or to join issue with the injured bondholders on the wrongs complained of in the Bill. The severe criti-

cism of the trial court, and the charges of prejudice and lack of judicial fairness are extraordinary to say the least.

The judicial character and attitude of the Judge sitting in the District of Idaho needs no defense from us, either in this court or elsewhere, but the animus of the *amicus curiae* seems peculiarly unfitting in view of the fact that, by a strict interpretation of the scope of the original foreclosure suit, his clients were relieved from defending against charges of fraud except so far as they were strictly and necessarily related to the manner of obtaining the 718 bonds, and in view of the further fact that their corporate agent, the Railway Company, was given the benefit of a most generous application of equitable principles in allowing it a preference over the bondholders for the money it had paid out in course of the perpetration of the fraud of which the Court found it guilty.

The brief is a curious mixture of appeals for strict and literal interpretation of an alleged contractual limitation on the rights of the bondholders without regard to its inequitable and fraudulent results, and with equally urgent appeals for subrogation and the most extreme extension of equitable theories, misapplied, where he desires his clients to be permitted to wholly abandon their contract and receive the mercy, yes more, the gratuity of the court.

In the introduction there is a broad general charge that the counsel for the intervenors make "unfounded

assertions with respect to the evidence in the record." This is a charge which it is very easy to make but which is not resorted to in such general terms by responsible counsel accustomed to placing high value upon obtaining and justifying the confidence of the court. We recall no specifications in the brief that in any way support this charge and we believe the charge itself to be wholly without justification and to be made loosely and without due regard for the veracity of statement that courts have a right to expect from members of the bar.

In replying, we will follow the numerical arrangement of parts employed in the brief replied to.

I.

THE NATURE OF THE ISSUE.

The matter discussed by counsel for the Railway Syndicate under this head can only have one interpretation—that it seeks to repudiate the agreement made by all parties concerned and their solicitors with each other and with the Trial Court and set forth in the decree: to-wit, that the "*decree shall be regarded so far as such fact may be at any time material as having been made after sale and upon distribution and as upon an application of said Railway Company as a bondholder to share in such distribution and as against objection by these intervening bondholders.*" (Trans. 163). Notwithstanding this agreement of all parties with each other and with the Court, made and requested in good faith by all parties to the cause, the *amicus curiae*, avow-

edly representing parties *not before the court*, says (p. 4) that the issues "did not present the question of the rights of the Railway Company upon distribution and accordingly * * * the rights of the Railway Company upon distribution should not be curtailed." His attitude and position in this matter is a fair sample of his attitude toward the Trial Court and toward the questions of fact and law that properly arise upon the record before the Court.

II.

The caption of this section is "The Assumed Insolvency of the Idaho-Oregon Light and Power Company Was Not a Fact."

We have always supposed that the function of a friend of the court was to aid the court by discussing propositions of law and not to make an argument upon the facts in the record, to say nothing of disputing the facts found by the Trial Court, or impeaching or contesting the record or the facts not questioned by the parties to the record.

The suggestion that the Idaho-Oregon Company was not insolvent in the fall of 1912 was made for the first time upon the oral argument in the Court of Appeals. It was never heard of in the Trial Court. It is true, as counsel asserts, that the Bill in Intervention does not in so many words allege the insolvency of the Power Company on September 25, 1912. It must be remembered that at the time the bill was filed the facts with reference to the Power Company,

and in a still larger degree the facts with reference to the Railway Company were a closed book to the intervenors. It is fairly inferable from the Bill that at the time it was filed in the summer of 1913, the intervenors believed that it was the duty of the Railway Company, as practically the sole stockholder of the Idaho-Oregon and holding its second mortgage bonds to the amount of nearly a million and a half dollars, to maintain the Idaho-Oregon as a going concern, postponing if necessary the payment of interest to themselves on their second mortgage bonds until they should have completed the Ox Bow, and until the development of the country had made it a stable and self sustaining enterprise. Their feeling and opinion in that regard in no way militates against the fact that the proofs in the course of taking depositions over a period of several months showed conclusively that the Idaho-Oregon was insolvent on September 25 and that the insolvency peculiarly fitted the definition which the *amicus curiae* selects for the purpose of argument, namely "in the sense that" the directors "knew that its business could not be continued and understood that it would not be." Counsel complains that the issue was not presented by the Bill and that the Railway Company therefore had not been afforded an opportunity to show affirmatively that it did not consider the Power Company insolvent in September or December, 1912. There is a striking lack of candor and consistency about this statement. The *amicus curiae* was present throughout the trial in the Dis-

t.ict Court, and participated therein. He knows that the efforts of the Railway's counsel including himself were directed to showing that the Idaho-Oregon was in a desperate financial condition in September, 1912. Any lack of insistence upon this in the record by the intervenors is fully accounted for by the fact that it was at no time disputed by their opponents but constantly and consistently admitted.

We dispute the right of the *amicus curiae*, heard by grace of the parties and of this court, to repudiate the admitted position of the appellant and set up a theory of his own upon a question of fact. Why should appellees be required to argue this question in this Court? We contend that at this time and place, upon the record, and upon the brief of the only accredited counsel of the Railway Company, it is not arguable or disputable. We respectfully refer to the Railway Company's brief and quote: (p. 114) "The Company was not even approximating in earnings the interest upon its second mortgage bonds and default upon those bonds if the earnings or any cash available should be relied upon to pay this interest would fall inevitably upon November 1st, less than forty days from the date of the meeting of September 25th. In addition to these facts the company was confronted by competition in the heart of its market. The competitor had already obtained its franchises, built its line to Boise City and had completed its soliciting campaign, having signed up

contracts the number of which there was at that time no means of knowing. It had also established a new rate some forty per cent lower than the existing power rate of the Power Company."

(P. 117). "The financial condition as shown by the evidence of the interveners, was such that it could not meet its obligations and survive the 1st of November."

(P. 118). After discussing the contract of the bankers to buy an additional \$140,000.00 of second mortgage bonds and suggesting that "assuming the Directors to have been entirely honorable men, they would not have called for the balance of this commitment under these conditions when it could do the company no good." * * * "We feel satisfied that no court would hold that an insolvent corporation is bound, because it has an outstanding contract to sell its securities to increase its indebtedness by completing such sale. We think therefore, that the second statement of the court that the Company had this sum available on demand is true only conditionally and with qualification."

(P. 119). "Without quoting this testimony in detail it is apparent that all the bonds sales had during the year 1912 were generally based upon the proposition that a strong financial syndicate had gotten behind the properties of the Power Company, and would take care of any situation which might arise, and buyers generally were not aware of the Company's actual condition (pp. 343-345). It

would have been a palpable and inexcusable fraud, legal and moral, upon the public, approaching if not equaling criminality, to have brought these bonds out on the credit of the syndicate without stating the actual conditions. If the conditions were truly stated, viz., that the Company could not earn the interest upon these bonds outstanding at its present rates, and that those rates on January first would have to be cut, to meet competition, at least forty per cent in addition to the loss of all business which the competitor might get, we do not think the bonds were worth fifty cents on the dollar or any other sum of money. They simply could not have been marketed."

(P. 120-121). "Turning to an affirmative argument, we submit that the Record here shows that the Power Company, particularly its stockholders, received a very valuable consideration through this transaction, namely, the maintenance of the company as a going concern until such time as its future could be considered and determined in the light of the new conditions which were to surround it. It could not pay the interest on its second mortgage bonds under the existing conditions. That had been demonstrated and consequently a reorganization was inevitable."

(P. 125). "True, if the Power Company was hopelessly insolvent as then (at the time of the Bates & Rogers transaction) seemed to be the case, its rights may not be of great importance if their protection is secured at the expense of creditors, but that

the creditors were not injured we will endeavor soon to show."

(P. 136). (Discussing equitable reimbursement to the second mortgage bondholders and their expenditures on the property) "Looked at from the standpoint of the creditor, the Railway Company, assuming the insolvency of the Power Company and the imminence of its liquidation and disregarding every consideration for the transaction involved save and except the surrender of the second mortgage bonds, we can conceive of no fairer act by a board of independent directors than the transaction here questioned consummated."

(P. 158). "Analyzed as we have endeavored to analyze them, the facts are not complicated, nor are the principles contended for difficult of expression or comprehension. The practical situation which is here presented is one by no means of rare occurrence. A company apparently prosperous, but fundamentally unsound, has conducted business for several years, but has become financially involved. An attempt is made by those in charge of its affairs to meet the situation through a readjustment of securities, and to hold it intact until such readjustment is brought about."

Upon the trial in the District Court counsel for the Railway Company consistently with the Railway Company's attitude throughout the trial and consistently with the present attitude as shown by the foregoing quotations from the Railway Company's brief, stated upon the argument that the Railway

people at the time of the first transaction involving an exchange of bonds on September 25th, 1912, had come to the conclusion that the Idaho-Oregon Company could not go on with its business and that the course then inaugurated and subsequently pursued was in pursuance of that conclusion and adopted for the purpose of protecting themselves as they had a right to do. The *amicus curiae* being present took no issue with this statement but on the contrary in his argument adopted the same position and enlarged greatly upon the proposition that the rights of the intervenors were confined to the four corners of their contract, that their contract had been complied with and that they had no legal ground of complaint no matter what the directors did with these bonds and that the Railway Company had a perfect right to appropriate them to its own advantage.

In view of these declarations by the Railway Company's counsel, why should not the Court have found what the parties admitted? And why should this friend of the Court, who is not counsel of record or representing a party to the record, consider himself at liberty to dispute a fact which no party of record disputes? Why should he be permitted to raise, as the one fundamental error of the Trial Court, a question not assigned as error by the appellants in this Court?

Counsel who appears as *amicus curiae* informs us in the opening sentence of his brief that he represents "those who have supplied approximately \$6,500,000.00 to finance the investment represented

by the securities of the Idaho Railway, Light & Power Company (hereinafter called the Railway Company), including the interests of that Company in the Idaho-Oregon Light & Power Company." It would seem that it is not important here how much his clients may have invested in the Railway Company. That the securities of the Railway Company, which his clients hold, may not have attained the value which the syndicate expected, affords no reason for recouping their losses in that Company by appropriating the assets back of the first and refunding bonds of the Idaho-Oregon Company held by these interveners and numerous other small bondholders scattered over the country. As aptly said by the Trial Court, they are not "privileged to strip it of its meager remaining resources for the purpose of recouping their private losses."

The proceedings of the syndicate and of the directors operating in their behalf are contrary alike to the law of corporate management, to one's sense of common fairness, and to the fundamental principles of equity, although they may find some precedent in past operations of members of that syndicate and others operating in centers noted for schemes of high finance.

From counsel's brief it is clearly apparent that he appears in the case because he represents parties directly in interest in this proceeding; that he is in fact a partisan in the case, and only in theory an *amicus curiae*. For reasons best known to himself he has abstained from making his clients, who are so much

interested in this case, parties to the cause so that they could be bound by any decision that would be rendered. As *amicus curiae* he has no control over the suit or the condition of the record. He can only suggest matters to the Court arising upon the face of the record and the specifications of error made by appellants. He can not take exceptions to rulings to which appellants have not excepted.

“He will be deemed not to be aggrieved if the Court declines to adopt his suggestion, whether brought to the attention of the Court by motion or in any other manner, and, hence, he can not make a valid exception to the ruling of the Court, as his friendly offices, conceding them to be disinterested, are at an end when he has informed the Court.”

Birmingham Loan Etc. Co. v. Anniston
First Nat. Bank, 100 Ala. 249, 46 Am.
St. Rep. 45.

Campbell v. Swasey, 12 Ind. 700.

3 Enc. L. & P. 837.

Parker v. State, 133 Ind. 178, 18 L. R. A.
567.

If his clients are interested in the particular case before the Court, and not in some other cause, leave to be heard as *amicus curiae* would have been denied by the Court.

In *Northern Securities Co. v. United States*, 191 U. S. 55, 48 L. Ed. 299, the Court says:

“It does not appear that applicant is interested in any other case which will be affected by the

decision of this case; as the parties are represented by competent counsel, the need of assistance can not be assumed and consent has not been given.

Leave to file must, therefore, be denied."

In the case at bar counsel for interveners stipulated that counsel who now appears as *amicus curiae* might as such file a brief, but that does not enlarge his authority in the case. He is still limited to such questions as may be raised by one who appears as a friend of the Court. Neither in the specification of errors contained in the record or in the brief of appellant has the question been raised that the decision of the Trial Court that the Idaho-Oregon Company was insolvent in September, 1912, was not sustained by the record. Under the authorities and the rules of the Court this question can not be raised for the first time in this Court without it having been assigned as error by appellant; it can not be raised by one who appears only as a friend of the Court and who does not represent a party to the cause.

The argument that the Railway Company could not have intended in the fall of 1912 to permit the Idaho-Oregon to default and could not have considered it insolvent because they then loaned it \$250,000.00 is seen not to possess any weight because of the fact that it took or was to take \$500,000.00 of first mortgage bonds as collateral for the loan, which even in liquidation would doubtless yield that much, and obtained the enormous additional advantage of transferring to itself \$718,000.00 of first mortgage

bonds, thus enabling it to share in the first mortgage security to that extent.

The policy of the Railway Company is further illustrated by the fact that it did not relinquish its hold upon the property, nor did it cease to furnish money for additions thereto even after the default and foreclosure, and why should it? It had not the slightest fear that the property would ever pass out of its control or the slightest doubt that whatever it put into the property it would ultimately retain and in addition thereto it would acquire the interest of the first mortgage bondholders by a skillfully devised plan of confiscation. It fully intended to maintain the property as a "going concern" in the sense of a continuously operating utility and to obtain and retain all the benefits that would accrue therefrom; but so far as its creditors were concerned there is and never has been any doubt of the fact, freely admitted upon the trial, that in September, 1912, the Railway Company intended that the Idaho-Oregon should default and undergo reorganization and "reorganization" in this case meant transferring the property to the owners of the Railway Company without giving anything therefor, except obligations of the Railway Company, junior or subordinate to those already held by the syndicate.

There is a perfectly consistent series of acts from September 25, 1912, down to the appointment of the Receiver in December, 1913—in fact down to this hour. They had a complete scheme for accomplishing a foreclosure of the first mortgage bonds. They

proceeded to acquire, by the exchange of seconds, as many of the first mortgage bonds as possible so that they should share in the proceeds, as well as have a voice in the foreclosure. Through a decoy "protective committee" they had no doubt they could obtain enough bonds, with the 718 already acquired, to conduct a foreclosure strictly under their own control, buying the property without competition at a nominal price, shutting out all unsecured creditors paying a trifling sum from the proceeds of foreclosure to those first mortgage bondholders who would not join them in their "reorganization" and giving those who did join a perfectly worthless second mortgage of the Railway Company junior to the mortgage which represented all of the money invested by the railway crowd in the Railway Company's properties and in the extensions and additions made to the Idaho-Oregon's properties during the period of reorganization. It was a beautiful scheme and it nearly succeeded.

III.

THE CIRCUMSTANCES WHICH JUSTIFY CREDITORS IN ASSAILING COR- PORATE ACTS.

This section seems to be devoted to the proposition that creditors can only assail a transaction of directors with the property of a debtor corporation, when the transaction which was complained of was entered into with the intent to hinder, delay or defraud such creditors. We have no quarrel with the phraseology as connected with this case though the

scope of an inquiry by a court of equity into a case of fraud is hardly limited by the familiar phraseology of the attachment statutes of the various states. We suspect that counsel's experience has misled him in respect to the scope of the theory of fraud in equity as set up in this section of his argument, and we will dismiss this with two or three observations.

First, the acts of September 25 and the months following were intended to "hinder, delay and defraud" creditors.

Second, dismissing the narrow statutory theory of fraud the whole scheme was fraudulent in intent, and method, in that directors, being also directors of another company, upon a consideration that was pretended only, and in pursuance of a large scheme of fraud, oppression and dishonesty, abstracted securities from the treasury of their company and appropriated them to their own use through the other corporation which they owned. Upon foreclosure sale and distribution of the property of the company which they have thus ceased to protect they present these bonds, thus fraudulently obtained. As the trial court most justly says in its opinion (Trans. 150) "It (the Railway Company) is dependent upon and is here invoking the assistance of a court of equity to make actually available to it the fruits of its wrong-doing. Through the trustee it seeks a foreclosure of the security of the bonds and an order distributing to it a proportionate share of the proceeds of the property. It is asking the court to aid

it in enforcing contracts the possession of which it obtained in a manner violative of sound principles of public policy and of good morals, and in that view it is quite unimportant whether the intervenors would have any standing as plaintiffs in an independent suit. Regardless of who objects or whether any one objects, a court will not knowingly assist a party to reap the fruits of his wrong-doing, and under the rule the Railway Company must be denied the relief which it seeks."

The many cases cited by counsel upon this head do not, it seems to us, assist the court in the determination of the question presented here. The proposition that creditors who were not creditors at the time of the fraud have no legal standing to complain, has no application, it is not disputed and there is an express stipulation that the 2494 bonds admittedly valid and the major part of which the intervenors now hold as a bondholders committee were issued and outstanding long before any of the acts complained of were committed.

Counsel opens part three of his argument with the assertion that we have not discovered a single case holding that bondholders situated as are the intervenors have ever been accorded the right to question the acts of their corporate debtor in disposing of its property "unless by such acts their contract has been breached." If by the qualification quoted the counsel means some letter of the contract, the statement of course is not true. Fraud affecting creditors perhaps rarely attacks the letter of a creditor's contract.

It operates by destroying the benefits of his contract and not by violating the letter thereof. The cases of Jackson vs. Ludeling (88 U. S. 616) and Wabash vs. Ham (114 U. S. 585), the two cases decided by Justice Woods of Indiana, the West Virginia cases of Sweeney vs. Refining Company and innumerable others which might readily be cited are all cases where the fraud operated to take away the benefits of the contract without in any way affecting the letter thereof.

As stated upon the oral argument the case of Richardson vs. Green (133 U. S. 30) is fairly illustrative of the case at bar and perhaps a case sufficiently identical, as to its facts, to be of the greatest assistance. It is absolutely identical in that there was a foreclosure of corporate bonds secured by deed to a trustee, no defense by the principal debtor, intervention by various holders of bonds secured by that trust deed and a denial by certain of the bondholders of the right of Richardson as the holder of other bonds to share because his bonds were obtained by fraud. Counsel apparently seeks to convey the impression to this court that the 1105 bonds referred to by us were held by Richardson as Treasurer, though he skillfully involves the statement with matters respecting other bonds and does not say categorically that they were. The 1105 bonds were not held by him as Treasurer but as security for a substantial sum of money actually advanced, in recovering the bonds from another person, and to prevent their sacrifice by that other person. He obtained

judgment for this money, levied on the bonds and bought them in. The court found that in so doing he had taken advantage of his position and, because of his relations and the advantage thus taken of other bondholders, his act was fraudulent and he was not permitted even to recover the money he had paid out in connection therewith. The case at bar seems to us a much more flagrant case of deliberately planned fraud and wrong-doing than the Richardson case. Richardson may have, and probably did act in the first place, at the time he paid out his money, in good faith, while here the acts of September 25 and following were all a part of a deliberately pre-conceived and elaborate scheme of fraud and oppression.

IV.

FRAUD WHICH ENTITLES CREDITORS TO ASSAIL.

Sixty pages of a closely printed brief are devoted to an inquiry as to what fraud entitles creditors to assail corporate acts, and an attempt is made to demonstrate that no such fraud is shown in the case at bar. It seems unnecessary to follow counsel through the various steps of his extremely technical argument. It seems to be conceded by counsel that the intervenors are, for the purpose of this suit, in the position of judgment creditors, therefore all inquiries as to the status of creditors whose claims are not reduced to judgment is aside from the question. It is clear also that these intervenors have a first

right in or lien upon the property through their mortgage. If it were necessary that actual intent to defraud these creditors should be shown it is amply established by this record.

The cases cited by counsel where a director or officer has been permitted to retain a preference because of security voted or given to himself, have little if any bearing on the question before the Court in this case. Never has a court of equity allowed directors and officers of a corporation to reap the benefit of deep-laid schemes to defraud innocent bondholders whose property the offending parties were for the time managing or manipulating through the ownership of watered stock representing no value but carrying with it the control of property built and acquired wholly from the bondholders' money.

The cases where preferences have been allowed to stand showed honest attempts to protect other creditors and keep the concern going, whereas in the case at bar the transactions which the Trial Court set aside were clearly shown to be fraudulent devices and schemes for defrauding the other bondholders for the exclusive benefit of the persons who devised and carried out the schemes and transactions involved.

The Railway Syndicate acquired control of the Idaho-Oregon properties through the ownership by the Railway Company of about 80 per cent of its worthless capital stock—stock that had no real value and represented no property, but nevertheless gave to the owner the absolute control of the property.

This stock control served well the purposes of the Railway Syndicate, for through the holding of such stock they could operate and control the Idaho-Oregon Company, manipulate and dictate its policies. The directors and officers of the Railway Company were made the directors and officers of the Power Company, and as the investments of these officers and of the Railway Syndicate were directly evidenced by the stocks and bonds of the Railway Company it was to their interest to vest in the latter company absolutely all the properties of the Power Company and, if possible, free and clear of its outstanding bonds. They promptly set about, therefore, to build up the Railway Company, to transfer to the latter the large consumers of power such as the traction companies, and to enlarge and fully equip the Swan Falls plant of the Railway Company, leaving the Ox Bow plant of the Power Company in an incomplete state. Having completely, as they believed, circumscribed the business and operations of the Power Company by the properties and system of the Railway Company so that the former was merely a pawn in the hands of the Railway Company, there remained only the foreclosure of the first and re-funding mortgage bonds of the Power Company, and upon the sale of the property under such foreclosure there could be but one bidder, viz.: the Railway Company. It could acquire the properties of the Power Company at its own price, for by the time of the sale it was believed that the Power Company would be so completely linked with the Railway Company that no

independent interests could afford to even consider bidding on the property.

To avoid paying out as little cash as possible at the sale and to share in the meager proceeds from that sale the Railway Syndicate conceived the scheme of exchanging the second mortgage bonds which they held for first mortgage bonds. Through the ownership of a large amount of first mortgage bonds they would have a voice in the foreclosure, and through a decoy "Protective Committee" they expected to secure the deposit of enough additional bonds to give them absolute control over the trustee in conducting the foreclosure.

That this committee acted solely in the interest of the Railway Syndicate and the motives and purposes that actuated the transactions under review in this case, appear from a circular which they sent out to the first mortgage bondholders of the Power Company five days before default actually occurred, but sent out early for the purpose of forestalling the organization of any committee by the bondholders themselves (Exhibit "B," Trans. pp. 80-89). This circular sets forth the large interests of the Railway Company in the Power Company, showing its stock ownership, as well as its ownership of the 718 bonds and other interests, and the committee say in this circular: "Manifestly, therefore, both on account of its large holdings of the securities of the Oregon Company and because of its *dominant position* as the owner of very large consumers of power in the territory served by the Oregon Company, the

co-operation of the Railway Company will be essential to the success of any plan for the readjustment of the finances of the Oregon Company. Indeed, without the assistance of the Railway Company, it is difficult to perceive how any readjustment could be brought about except through the slow process of a receivership. By reason of the foregoing, the committee has taken up the matter with the Railway Company, and after careful consideration of the entire situation, is able to report that it has arranged with the Railway Company to consent to a readjustment of the relations of the two companies and of the obligations of the Oregon Company, upon the following basis:"

They set forth a scheme of reorganization which has for its sole purpose the giving of an inferior subordinate debenture or bond to the first mortgage bondholders of the Power Company, and the railway bonds, held by the Railway Syndicate are to be made a first lien upon all the properties of the Power Company. To any one at all familiar with the facts and the true situation as it existed, the proposed scheme was so glaringly fraudulent that it would not have received a moment's consideration, but the innocent and small bondholders scattered from the Atlantic to the Pacific, unfamiliar with the property, having no information concerning it except what they received from the Power Company and its officers (who were the agents and nominees of the Railway Syndicate and who were acting in the interests of that Syndicate), were expected to, and in most cases

did, consider the situation hopeless. What little information they could receive about their securities was limited to what the Railway Syndicate thought it wise to give them consistent with the proposed scheme of reorganization.

The small and hopeless bondholders, not knowing that this pretended "protective committee" was acting wholly in the interest of the Railway Company, entrusted it with their bonds to use in the reorganization as the committee thought best. Apparently for fear that the true facts would soon come to light and their plan exposed, the committee hastened to file the foreclosure suit at the earliest time permitted under the terms of the trust deed. The bill was filed on July 7th. The subpoena was made returnable on August 11th and in the meantime the defendants in the case, acting under the direction of the Railway Syndicate, filed *pro forma* answers raising no issues and stipulated for taking depositions, and such depositions were taken so that on the return day of the subpoena, viz.: August 11th, the cause was ready for submission to the Court for final decree; and within a month thereafter the property would have been sold and bid in by the Railway Company at its own figure.

The argument of counsel that the fact that the Railway Company advanced money to keep the Power Company going shows that it did not believe the Power Company to be insolvent, means nothing. It will not be denied that these advances continued during the foreclosure and after the foreclosure,

practically until the receivership. The true motive and reason for doing so was the fact that the Railway Company expected to bid in the property at its own figure for it was manifestly impossible for any outside or independent interest to get information as to the earnings or income of the property or any facts as to its operating history or the value of the estate, except through the officers of the Railway Company. Hence, it was immaterial when the repairs or improvements were made. This also clearly appears from the interviews of counsel for the Power Company and its general manager given out at the time this suit to foreclose was filed (Trans. pp. 51-54).

The Trial Court had all these facts before it. It had an intimate knowledge of the entire situation because of the various phases of this controversy that had come before it. It had the true measure of the Railway Syndicate and the purposes and motives that actuated the directors in the transactions under consideration here. The facts were so apparent and so well known to the distinguished Judge who presides over that Court that no argument, however extended or however technical or plausible, could convince that Court that the transactions involved were honest efforts to protect the Power Company and its creditors. It was too apparent that the transactions were made for the purpose of benefiting the Railway Syndicate and to accomplish a transfer of the properties of the Power Company to the Railway Company and for the purpose of taking an unfair

advantage of the bondholders of the Power Company.

When a situation is such that it causes the calm, deliberate and distinguished Judge who presides over the Trial Court to characterize the transactions here involved in the positive and strong language that we find in the opinion in this case, it may be safely assumed that the facts were extraordinary, to say the least. The Court could not do otherwise than it did. It well said: "Regardless of who objects or whether any one objects, a court will not knowingly assist a party to reap the fruits of his wrong-doing, and under the rule the Railway Company must be denied the relief which it seeks." (Tr. 151).

Much space under this section is devoted by the *amicus curiae* to a discussion of the trust fund theory and it is alleged that the doctrine is inapplicable except in cases of *confessed* insolvency. This proposition we submit finds no support in the adjudicated cases. Much reliance is placed upon the case of *Hollins vs. Briarfield Coal and Iron Company*, 150 U. S. 371, and alleged quotations are made from the opinion of the court in that case. The friend of the court seems to have been unfortunate in the selection of a clerk to copy the extracts from the opinion. The first quotation begins near the bottom of page 385 (p. 1117 Vol. 37 L. Ed.) and as found in the Law Edition reads as follows (The part in italics is the part intended to be quoted):

"The officers of a corporation act in a fiduciary

capacity in respect to its property in their hands and may be called to account for fraud or sometimes even mere mis-management in respect thereto; but as between itself and its creditors, the corporation is simply a debtor and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor. This is certainly the general rule, and if there be any exceptions thereto, they are not presented by any of the facts in this case. *Neither the insolvency nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions nor all together gave to these simple contract creditors any lien upon the property of the corporation nor charged any direct trust thereon."*

As quoted in counsel's brief, the language is changed from a specific statement applied *directly* and *exclusively* to the case there before the Court, into a statement of a general proposition. It is apparent that the court had in mind the particular facts of the case which were that there was a mortgage outstanding creating a prior lien upon the property of the company, that foreclosure of this mortgage had been instituted before these simple contract creditors began their action, that they were found by the court to have carefully avoided the foreclosure proceedings where they would have been relegated to their proper rank as junior to the mortgage and were seeking by an independent suit to get an independent receivership and an independent sale

of the property, antagonistic and superior to the lien of the mortgage. Certainly the court states only a patent fact in saying these simple contract creditors had not, by the insolvency and the fraud, obtained a lien in the sense that the mortgagee had one, nor superior to the lien of the mortgage.

There is a similar infirmity in the next quotation from the Hollins case. It is taken from page 383 of the official reports and from page 116 of the Lawyers' Edition. It is quoted as though it were a continuous and connected expression of the court, whereas there is, in the opinion, intervening matter, and, again the form of expression is different from that reported in the Lawyers' Edition of the reports.

The Hollins case in no wise attacks the principles of the trust doctrine, and the application thereof to the facts in that case is entirely consistent with the very different application in other cases where both the Supreme and Inferior Federal Courts have held a trust to exist in favor of creditors. In the Hollins case the plaintiffs were unsecured creditors having claims contracted four or five years after the execution of the trust deed and the execution of the bonds. After a suit had been begun to foreclose the trust deed, these creditors filed an independent suit in the same court alleging that the conveyance to the trustee was fraudulent that a large amount was still due on the stock, and asked to have a receiver appointed and the property sold in the satisfaction of their unsecured claims. They allege the pendency of the foreclosure suit but did not seek to intervene therein.

After a decree and sale in the foreclosure suit, a final decree was entered dismissing the suit of the unsecured creditors and the appeal was prosecuted from that order. Justice Brewer in delivering the opinion said:

“Doubtless in such foreclosure suit the simple contract creditor can intervene, and if he has any equities in respect to the property, whether prior or subsequent to that of the plaintiff, can secure their determination and protection; and where, by the express language of the bill filed by the trustee, all claimants and creditors were invited to present their claims and have them adjudicated. These plaintiffs did not intervene, though as shown by the allegations of their bill they knew of the existence of the foreclosure suit; neither did they apply for a consolidation of the two suits. On the contrary the whole scope of their suit was adverse to that brought by the trustee and in antagonism to the rights claimed by him. They intended to keep away from that suit, and intended to maintain, if possible, an independent proceeding to have the property of the debtor applied to the satisfaction of their claims. But this as has been decided in the cases cited, cannot be done.”

The Hollins case was principally relied upon in the case of Sutton Manufacturing Co. vs. Hutchinson, 63 Fed. 496, which was decided in the Circuit Court of Appeals for the Seventh Circuit, by Justice Harlan, and Judges Jenkins and Bunn, Justice Har-

lan delivering the opinion. The case was decided in the Circuit Court upon the authority of *Lippincott vs. Carriage Company*, 25 Fed. 577, and *Howe vs. Tool Company*, 44 Fed. 231, the cases by Judge Woods heretofore cited in a decree setting aside a mortgage and the Circuit Court of Appeals declared in the opinion that there was no error in the decree. After referring to *Curran vs. State*, 15 Howard 304, *Drury vs. Cross*, 7 Wallace 299, *Graham vs. Railroad Co.* 102 U. S. 148, *Railway Company vs. Ham*, 114 U. S. 587, *Koehler vs. Iron Company*, 2 Black 715, and *Richardson vs. Green*, 133 U. S. 43, and citing from those cases in support of the doctrine that when a corporation is insolvent or its managers have ceased to intend to continue its business or pay its debts, the assets of the corporation become a trust fund for its creditors. Justice Harlan says (page 500) :

“There is nothing in *Hollins vs. Iron Company* (150 U. S. 371, 382) to which appellant calls attention that is at all inconsistent with these principles. On the contrary the court, while reaffirming the doctrine that the property of a private corporation is not burdened with any specific lien or trust in favor of general creditors, observed that such a corporation when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming insolvent, and in each case such lien and trust will be enforced by a court of equity in favor of creditors.

“It is, we think, the result of the cases that when a private corporation is dissolved or becomes insolvent or determines to discontinue the prosecuting of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technically trustees they hold, in respect to the property under control, a fiduciary relation to creditors.”

There is, of course, no contention here that the property of a corporation is affected by a specific trust in favor of creditors so that the corporation and its managers may not deal with the property in good faith in the usual course of business while it is solvent and proposing to maintain itself and pay all of its obligations justly incurred. But the doctrine is too generally and clearly established in the decisions of the Federal Courts to be longer matter of contention that when a corporation has become insolvent or when it no longer intends to go on with its business and pay all of its obligations, but having abandoned that intention, begins to make special disposition of its property to the advantage of certain creditors, its assets become charged with a trust in the hands of its officers and directors for all of its creditors as their priorities then exist. Peculiarly and emphatically is this the case when it begins to make such special disposition for the benefit of its

directors and officers. This is the state of the facts here and upon this state of facts the application of the principles is so clear and legally unimpeachable as to leave no ground for reasonable doubt.

Validity of the acts by which the 718 bonds were obtained is asserted (p. 43) upon the ground that the transactions had been fully executed and that neither the corporation nor its stockholders had complained. This reasoning does not differ from earlier reasoning of the same counsel that only the corporation or its stockholders can avoid or attack the validity of the transaction. The "execution" of the contract and its ratification by acquiescence of this completely subservient corporation, having no independent directors, and having to all intents and purposes only one stockholder—the one benefited by the fraudulent acts—can have no effect upon the rights of the creditors who are the ultimate sufferers from the fraud.

The peculiar point of view of the friend of the court with reference to frauds upon creditors is illustrated by the solemn statement (p. 44) that "as both stockholders and creditors if they so desired, they were entirely within their rights in seeking to better their position."

An attempt is made by review and discussion of the record to explain and justify the acts of September 25 and December 27th, 1912, and passing reference will be made to some of the arguments advanced.

It is suggested for example (p. 50-51) that the

loan of \$250,000.00 is inconsistent with the view that the directors did not intend to keep the Idaho-Oregon going; that some much easier and simpler device could have been found that would have taken less money and would have been equally effective in sequestering the first mortgage bonds which they desired to seize. The answer to this is that their plans did not intend an abandonment of the property to be sold to a stranger for whatever it might bring. They had not the slightest intention of losing their hold on the property for a moment. What they intended was that without losing such hold and with the least possible damage to the business and good will and value generally of the estate, they would clean out the unsecured creditors completely, put through a rigged reorganization in which the holders of the senior securities of the Power Company should become junior and that otherwise everything should sail along smoothly. There is a most essential difference between an intention to maintain a company as a going concern, paying all of its creditors in the course of business as their priorities appear, and keeping it a going concern in the sense of its physical operation and the maintenance of its business while defrauding and eliminating its creditors by devices to which modern corporate organization and interrelations lend themselves.

The *amicus curiae* will probably not object to our going outside the record to state that the Railway Company did even more than loan \$250,000.00 in the fall of 1912. It loaned other sums in the spring

of 1913 and even furnished property and paid for labor to the value of more than \$50,000.00 in adding to the Idaho-Oregon plant *after the default on April 1st, 1913, and in part after the foreclosure suit was in full swing.* Are these later advances to be taken as evidence that the company was not insolvent and that its directors and officers still intended to maintain it as a going concern, meeting its obligations? The Railway Company had a hold upon the property of the Power Company which it considered unshakable in view of the fact that the only persons to be fleeced were about 600 small bondholders holding mostly from one to five thousand dollars each, and scattered from Maine to California. That the confidence of the Railway Company in its ability to handle the situation and completely carry out the scheme was well founded is shown by the fact that it got into its control, through the decoy "protective committee," more than 80 per cent of the first mortgage bonds and had everything but the final step in the plan accomplished before these intervenors got into the situation and saved the unsuspecting and innocent bondholders from being sold out by and for the benefit of the Railway Syndicate.

Counsel is in error (p. 51) in the statement that the notes given for the \$250,000.00 gave the Power Company a year of credit. He omits a most important element of the collateral agreement under which the money was paid out. (Tr. 118) "The principal of this note shall become due and payable

"a. Upon default being made in the due and

punctual payment of any installment of interest thereon; or

“b. Upon default being made in the due and punctual payment of any installment of interest upon any of the Idaho-Oregon Light & Power Company’s bonds; or

“c. Upon any Court proceedings being instituted against Idaho-Oregon Light & Power Company for the purpose of appointing a receiver or otherwise sequestrating its assets for the benefit of its creditors.”

By these provisions the very plan which the Railway Company was then pursuing would make the \$250,000.00 due whenever the Railway Company chose to do or permit to be done any of the three things enumerated.

It is further declared (p. 54) that after the adoption on September 25th of the first resolution authorizing the transaction, there was at the same meeting another resolution unanimously adopted authorizing the execution of the papers to carry it into effect. If this court has the record of September 25th in mind, it will recall that the complete minutes of the whole meeting had been prepared in advance by the Company’s New York attorney, including even the way in which the members of the Board were to vote, that the record as to the first resolution pretending to authorize the scheme is false, that the only validity that the rest of the record possesses rests upon the fact that after the first resolution authorizing the deal had been put through, there was no evidence

that further objection was made to the previously prepared record perfunctorily carrying out the subsequent steps. We submit that this part of the record scarcely possesses the importance counsel seeks to attribute to it under the circumstances that fully appear.

All attempts to make this fundamentally dishonest and fraudulent transaction of September 25th appear in other than its true light must fail. No dispassionate view can be taken of it without coming to the conclusion declared by the learned trial court after having had these matters before him in a multitude of phases for more than a year.

“That under the circumstances such an agreement was thought by anyone to be in the interests of the Power Company is wholly incredible. I cannot believe that an independent Board of Directors would have given to it a moment’s consideration.”

The transaction which was hung upon the settlement with Bates and Rogers is even more transparent and unmistakable in its true character. It is undisputed in the record that Rogers told William Mainland in substance that he would take first mortgage bonds at their regular market price; but that he would not take seconds; that when this was suggested to Fuller, Fuller refused to give him first mortgage bonds but insisted upon giving him seconds accompanied by the Railway guaranty. Why should the Railway have been so eager to obligate

itself unnecessarily for \$20,000.00 of the Idaho-Oregon obligations? The explanation is at hand. They hung upon it an agreement for a further exchange by which to obtain \$500,000.00 more of first mortgage bonds for the Railway. The *amicus curiae* argues that the transaction could not have been a deliberate fraud upon the part of the Railway because Mr. Mainland who was not one of the bankers or a member of the syndicate signed the contract. In the first place, while it is true that Mr. Mainland was not one of the bankers, he was the President of the Railway Company, had exchanged all of his Idaho-Oregon stock for Railway stock and his sole stake in the combined properties was represented by the Railway stock. In the second place he testifies that he never knew, until a few days before the taking of his deposition in the spring of 1914, that there had been a second exchange authorized. This is not so difficult to reconcile with the fact that he signed this contract to that effect, as it might appear. It is evident that he had very little to say about the affairs of the Company. Fuller and his "managing director" Watson had entirely superseded the President as the Chief Executive of the Company and reduced him to the position of a rubber stamp.

The amount of bonds named was the same as in the first contract. It is not a violent presumption that he had gotten to where he signed whatever was presented to him by the New York counsel with little more than casual explanation and it would have been very easy for him to have supposed, especially

if the parties handling the matter were willing that such should be the case, that it was a confirmation and further consideration of the exchange already authorized.

The Trial Court reached the inevitable and only conclusion possible. It says:

“From the testimony and the surrounding circumstances no doubt is left in my mind that the Power Company could have made settlement directly with Bates and Rogers with its first mortgage bonds at a comparatively small discount, and that the devious course was adopted not upon their demand or for the interest of the Power Company, or because of any necessity therefor, but for the sole purpose of furnishing a pretext for getting the first mortgage bonds out of the treasury of the Power Company and into the hands of the Railway Company, and for the interest alone of those by whom the latter company was dominated.” (Trans. 144).

A reference is made (p. 60) to the balance sheet of the Railway Company for the purpose of showing that the conclusion of the trial court that the Railway Company was also insolvent was unfounded. This court should not be misled by enormous figures in these balance sheets. The stock of the Railway which was outstanding to the amount of about sixteen million dollars represented *nothing* and it is off-set in these balance sheets by wholly fictitious figures under property, plant and equipment and by

putting in the par value of securities owned, which consisted for the most part of Idaho-Oregon stock for which not a penny had been paid, but which, as appears from the record, was received as a bonus with the second mortgage bonds.

Counsel takes exception to that part of the Trial Court's opinion which calls the Directors of the Power Company by their true names. We do not see how this can constitute reversible error. Had counsel made his suggestion in the Trial Court at the time of the argument and there requested protection in this regard, it may be that that Court would have found a way of referring to these directors by assumed names so as not to embarrass them in their future operations. The fact remains, however, that until the financial ruin of the Power Company had been decided upon the Syndicate had employed to its full advantage the advertising value of the names of these directors and their connection with large financial institutions in New York. The record shows that this advertising was not without its affect on the sale of securities of the Power Company, and was used to the advantage of the Syndicate or the Syndicate managers by Kissel, Kinnicutt & Company in the very interesting operations which they conducted with Beierlein & Reynolds, Chicago brokers, in purchasing and selling upon an advancing market the bonds of the Idaho-Oregon Company. (See particularly the circular of February 9, 1912, Trans. pp. 360-362).

The directors of the companies seemed very willing

to have their financial connections advertised when it would result to the Syndicate's advantage, and the Trial Court no doubt did not consider that it was unfair to them or to the public to set forth in a judicial opinion the real facts as to their operations, or that there was any impropriety in so doing; and we respectfully submit that sound public policy by no means forbid reference to the directors of a Company by their true names in discussing transactions like those here before the Court.

Counsel discusses (p. 82) the fact of competition in the Power Company's field and apparently desires the Court to understand that this situation arose between December, 1912, and April first, 1913, the latter being the date of the default in the payment of interest on the first mortgage bonds. The record shows that the actual competition—that is the service of current to customers by the competing company began in December, 1912, or about the first of January, 1913. Counsel cannot expect this Court to assume or believe that nothing was known about the competition until the serving of current began. This question was not presented as a material or issuable fact at the trial but since use is being made of it, the Court will take judicial cognizance that a long time is required to construct a power plant, 100 miles of transmission line, and a distributing system in a city like Boise, and that franchises have to be obtained and contracts made with customers before business begins. The gentlemen therefore who were

serving as directors and officers of both the Railway Company and the Power Company were not in ignorance until January first, 1913, of the competition or of what it meant. They must have known it was coming for at least a year and there can be no doubt that the fact of this competition and the consequent reduction in the income of the Idaho-Oregon was the chief consideration moving the Railway Company to the course which it adopted. It had bought second mortgage bonds presumably believing at the time that it was going to be able to make them good. If loss and sacrifice were to be entailed by the competition it would fall first upon the stock which the Railway Company held, next upon the second mortgage bonds, practically all of which also it held. It is easily understandable that these gentlemen would not have entered upon a course of fraud and oppression directed against the first mortgage bondholders of the Idaho-Oregon without powerful considerations moving thereto, and these powerful considerations were furnished in part by the threatened loss upon their investment in Idaho-Oregon second mortgage bonds and in part by the failure of the Railway Company at the end of its first year of existence to show more than about 50 per cent of the income necessary to meet its fixed charges. But as the learned Trial Court says: "Their misfortunes in no wise enlarge their rights." The fact that they had exercised judgment almost inconceivably bad in their power and railway ventures in Idaho in no wise justified this fraudulent and unconscionable effort to

unload their losses upon the Idaho-Oregon first mortgage bondholders.

The point is made of the fact that the appointment of a receiver for the Idaho-Oregon was primarily at the instance of the intervenors. That charge we gladly admit, but the absence of a receiver was not interfering at all with the foreclosure at the instance of the Railway Company of the Idaho-Oregon first mortgage bonds which was proceeding merrily without a receiver (the Railway itself being the "receiver"), with the Railway Company in full possession and control of the property, receiving and disposing of its revenues as it saw fit and effectually preventing any outsider or the bondholders themselves from finding out anything about the property, or taking any of the preliminary steps that would be necessary if considering its purchase. The foreclosure of a general mortgage upon all the property of a public utility company without a receiver to take possession, operate and conserve the property during the foreclosure is a most extraordinary proceeding and one, it is safe to say, rarely attempted. Everything possible was done to lull the District Court into a feeling of security and into believing that it was a wholly "friendly" proceeding, conducted by great and good people for the benefit of all concerned. Upon the filing of the Bill to foreclose the counsel of the Railway Company and the Idaho-Oregon gave an interview to the press (Trans. 51) declaring that the foreclosure was "a formal step in the reorganization of the Idaho-Oregon Company"

that the provisions of the mortgage to the State Bank were not sufficiently elastic and it was necessary to liquidate that mortgage in order to put the Company in position to raise funds to meet demands for expansion and development of the property; that the Idaho-Oregon was to be merged into the Railway and that the consolidation "*has always been anticipated since the formation of the Idaho Railway Company in the latter part of 1911, but has been delayed pending the consummation of an agreement between stockholders and bondholders of the two companies as to a plan of reorganization which has now been attained.*"

The same assertions were frequently made in the early part of the proceedings when these intervenors were endeavoring to get a hearing before their property should have forever disappeared into the pocket carefully prepared to receive it.

Several pages are devoted by the *amicus curiae* (84-89) to a discussion of the plan of reorganization presented by the Railway Company and to showing that it was a beneficent plan which should have been entirely satisfactory to the Idaho-Oregon first mortgage bondholders. We will not follow this discussion in detail but call attention to the one outstanding fact about this plan and to one or two incidental matters.

The Idaho-Oregon first mortgage bondholders had a first lien upon a very large amount of property and upon the rest of the Idaho-Oregon property sub-

ject to some small underlying divisional mortgages. Under any and all circumstances they had a substantial and indefeasible security. The property earned in 1912 something like \$215,000.00 net according to the methods of accounting maintained by the Railway Company itself. That was \$35,000.00 in excess of the amount required to pay the interest on the underlying divisional bonds and all the first mortgage bonds bona fide outstanding (excluding the 718 bonds which were not taken out by the Railway Company until 1913). By the proposed plan of the Railway Company the property was divested of the lien of this first mortgage and was subjected to the lien of the Railway Company under which \$30,000,000 of bonds could be issued and under which six and one-half millions were actually issued and outstanding and the holders of this Idaho-Oregon first mortgage were put junior to the Railway mortgage. Note in this connection the fact that the Railway property itself, separate from the Idaho-Oregon property, was subject to nearly a million and a half of underlying bonds besides the six and a half million Railway firsts and was yielding only approximately 50 per cent of the income needed for its fixed charges. One vital and indisputable thing stands out and that is that the effect of this transaction was to sequester all of this \$215,000.00 of net income of the Idaho-Oregon and apply it first to the payment of interest on the Railway bonds held by this Syndicate.

Manifestly if a consolidation, as stated in the interview above quoted, was the purpose of the pro-

ceedings, the consolidation should have taken place upon the basis of the fair relative value of the properties and equities held by the two concerns and inasmuch as here there were no parties dealing at arms length, but a single body of men acting as directors for both companies, if it was desirable that there should be a legal consolidation into one corporation, the highest duty was imposed upon these directors to conduct it fairly and with scrupulous regard for the interests of security holders of the Idaho-Oregon not represented or able to act for themselves. Furthermore the holders of existing securities should have had in the contemplated company the same relative positions as to liens and priorities that they held in the separate companies. First mortgage bondholders in both should have had first mortgage bonds in the consolidated company in proportion to the value of the clear property upon which their liens rested and the value of the equities where they were subject to underlying bonds. Something approximating that arrangement is all that the first mortgage bondholders of the Idaho-Oregon ever desired or sought. But an arrangement which took their property bodily and handed it to another set of bondholders of another company and took \$215,000.00 of income and delivered it bodily to pay the interest to that other set of bondholders, was so outrageous, oppressive and intolerable, and the result (as they found out upon an investigation of the condition of the Railway Company) so unquestionably disastrous, that no pos-

sible course was open to them except one of resistance.

An incidental matter to which we wish to refer in this plan is the peculiar language of a certain paragraph of the Railway plan (Trans. 86). It seeks to give the impression that the new Railway second mortgage bonds offered to the Idaho-Oregon first mortgage bondholders was subject only to four and one-half millions of Railway firsts and to underlying bonds, bringing the total up to \$6,491,000.00; but the Railway mortgage, as above stated, was an open mortgage under which issues to \$30,000,000.00 were authorized. Note the language in the middle of page 86 of the Transcript. "The adjustment mortgage 5 per cent bonds will be a lien upon all of the properties mentioned, and *when issued* will be subject only to the following." That is to say, at the time of the issuing of the new first mortgage bonds to the Idaho-Oregon people there would be outstanding only this \$6,491,000.00; but the impression attempted to be conveyed was most misleading, for immediately thereafter the parties in control could issue any additional amount under the first mortgage and increase the amount outstanding indefinitely up to \$30,000,000.00.

V.

THE RIGHTS OF THE INTERVENORS ARE
CONFINED TO THEIR CONTRACT, WHICH
HAS NOT BEEN VIOLATED.

This branch of the argument of the *amicus curiae* is devoted to the proposition that the rights of the intervenors are confined to their contract and that this contract has not been violated. We cannot avoid expressing surprise that this proposition has been urged so vigorously and with such confidence, both at the trial and in this Court because it so manifestly disregards the essential character of the defense based upon fraud. Yet it must be admitted that it is the one argument of the Railway Company which can be given some appearance of substance. If we were suing or being sued upon our contract, the fact that the contract had not been violated would of course be material and conclusively so. But an action or defense based upon fraud may not, and usually does not, involve a breach of the contract itself. The essence of fraud is that by wrongful acts the party complaining is deprived of the benefits of his contract.

Take the case of Richardson vs. Green for example. The 1105 bonds had been duly and properly certified by the trustee just as in this case. They had been taken abroad by an agent of the Company to be offered for sale, they had become involved with a debt incurred in a foreign country so they were in danger of being lost, they were recovered by Richardson who furnished the money needed therefor and

the Company gave him its note or notes for such money. Afterwards through a proceeding upon those notes Richardson obtained possession and alleged legal title to the bonds by methods which the court found to be fraudulent and he was debarred from asserting them. In all of this there was no breach of any provision of the trust deed securing the bonds nor any suggestion that they had not been legally and properly certified by the trustee.

Take the cases decided by Judge Woods in Indiana where mortgages were set aside because constituting an illegal preference to directors or to concerns in which directors were interested. There was no breach of any express contract with the creditors who were aggrieved and at whose instance the mortgages were set aside.

Suppose the case of a creditor who holds a promissory note, unsecured, which he reduces to judgment and then finds that there have been conveyances of his debtor's property which prevent him from recovering upon his execution and he seeks to have them set aside upon grounds of fraud. There has at no time been any breach of the contract contained in his note.

In short all the labored argument that the letter of our contract contained in our bonds and mortgage has not been broken leads to nothing whatever applicable to this case. We are not complaining that our contract is broken. A fraud was committed outside of and in itself not related to our contract by which we are deprived of the benefits thereof.

There is another attempt (page 93) to repudiate the agreement entered into between the parties and the court with reference to the character of the issue and the time of its presentation as related to the sale, which will not be discussed further except to say that it seems to us to reflect strongly upon the counsel attempting such repudiation. Mention should be made in this connection of the assertions of the *amicus curiae* as to who is the mover and where rests the burden of proof (p. 96). The stipulation in the decree should be conclusive on the parties and especially on the *amicus curiae*. But entirely aside from that provision of the decree the law is clear and, we believe, the decisions are uniform that where a transaction is had whereby the directors of a corporation have obtained an advantage for themselves out of the corporate property, the burden is upon them to establish to the utmost the fairness and beneficial character of the transaction under which they assert their claims. (*Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673).

The argument is made, after the issue of the bona fide bonds numbering 2494, the mortgage security was largely increased and that, therefore, the intervenors have no ground of complaint if bonds are certified thereagainst and put out. This leads around in a circle to the same old ground. The bondholders would have no right to complain if the 718 bonds had been issued in good faith in the usual course of business and by a board of directors properly discharging its functions in promoting and protecting

the interest of the debtor and its creditors. There would have been no ground of complaint in the Richardson case if the 1105 bonds had been sold as was contemplated, and probably no ground of complaint if they had been foreclosed upon by the foreign creditor under a collateral agreement and had passed into the hands of bona fide holders for value, even though the consideration might have been relatively small. These intervenors say just what every creditor deprived of his security or his remedy by fraud says when he appeals to a court of equity for relief from such fraud; that the debtor's property has been dealt with, not in the usual course of business and in good faith, but by fraudulent methods for a fraudulent purpose, whereby the creditor has been wronged and defeated.

It is not of the slightest importance that there have been additions made to the property that would justify the rightful issue of additional bonds.

Much complaint is made by the *amicus curiae* of the Trial Court upon the ground that the Court permitted himself to be affected in his conclusions by facts that arose subsequent to the matters complained of and which are in issue. There is no ground for this complaint. There is enough and more than enough in the facts directly involved to justify all the conclusions at which the court arrived but we wish to point out that the Court is not precluded in determining whether a debtor was insolvent at a given time from considering subsequent events if they are in evidence. In fact it is quite often

subsequent events chiefly from which a judgment as to insolvency at a given time can be formed. The insolvency of course must have existed at the time in question but the evidence disclosing the fact of insolvency at the time and the purpose of the officers in taking security may be composed largely of acts and events subsequent to that time.

Counsel objects in a good many places in his brief and argues extensively under this head, that after the proper issue of the bonds neither the intervenors nor any other creditor can question their disposition. There is a confusion of idea or of language or of both in the use of this word "issue." Bonds are not issued until they have been delivered to a bona fide holder for value. The certification of bonds by the trustee does not constitute "issue" of such bonds. It is an entire misuse of terms when the word issue is so employed. A bond of a company is nothing but its note, or its promise to pay. Until it has been delivered to a bona fide holder for value, it is nothing but a piece of paper, and has neither value nor potency. The certification by the trustee does not make it property nor change its essential character. The certificate of the trustee is purely for purposes of identification of the paper when it shall have been actually issued by delivery to a bona fide holder for value. There is therefore no issue until the corporation has made such delivery, and the theory that a corporation "owns" its own promises to pay that have never been delivered to any holder for value is a mere figure of speech. There was therefore no

issue of the 718 bonds until the Power Company delivered them to the Railway Company in pursuance of the fraud perpetrated, and intended to be perpetrated, upon the first mortgage bondholders.

Counsel cites the case of *Bank of Toronto v. Cobourg, etc. Ry. Co.*, 10 Ont. 376, and says: "This case is so directly in point that we will quote from the report thereof at length, etc." From the stress laid upon this case by counsel there is no doubt but what he considers it the case most directly in point that he has so far found after an exhaustive search of all the authorities and cases on the subject.

We shall be glad, indeed, to have this Court examine that case. Nowhere has it been cited as authority or as even bearing on the subject to which it is cited by counsel. Cook on Corporations (7th Ed.) refers to the case at three different places in the text. On page 2074 it is cited as authority for the proposition that "a corporate creditor cannot complain that a company sold its bonds to some of the directors at a discount of 25 per cent." On page 2852 the same author cites it in the notes as authority for the same proposition. On page 2885 it is cited as authority in support of the statement that "it is undoubtedly true that a director may buy bonds at less than par if the transaction is *fair*, and if no stockholder objects."

Thompson in his treatise on Corporations cites the case twice. In Vol. 3 (2nd Ed.) Section 2241, the author says:

"The execution and issuance of corporate

bonds must be a real and bona fide transaction. It cannot be a mere trick or device to evade the law, and to impose greater obligations upon the corporation than there is occasion for it to assume, and such issue of bonds must be to promote the legitimate corporate purposes. This does not necessarily imply that the bonds cannot be issued or sold for less than their face value. The issuance of stock and bonds has been sustained, under constitutional or statutory provisions prohibiting corporations from issuing stock or bonds except for money, labor done, or money or property actually received, where such bonds were disposed of for the best price that could be obtained, though for considerably less than their face value."

And by way of illustration the author says that bonds have been sold to directors at a discount of 25 per cent, and cites the Cobourg case in support of such statement. The same author again cites the case in Section 2285, as supporting the statement that "A purchaser was held entitled to protection where he obtained bonds from a director at 90c on the dollar, even where he was informed that the bonds were issued to the directors at 70c on the dollar."

In the Cobourg case the question of fraud did not enter into the case. The transaction involved was, under the circumstances of the case, fair and honest, and the question was simply whether under such circumstances a director who had purchased bonds

at a reasonable discount would stand on an equality with other debenture holders who had previously and before the circumstances changed bought similar debentures at a higher price. The case was decided in 1885, and in the thirty years intervening the law as to corporate management and as to the duties and responsibilities of directors has undergone many changes.

The case of *Fisher v. McInerney*, 137 Cal. 28, and the case of *In re Regents Iron Works Company*, 3 Chan. Div. 43, are so wholly beside the question that it is unnecessary to review them here.

Counsel has carefully avoided citing any case where the directors involved were guilty of unfair dealing or fraud or inequitable conduct of any kind. He argues around the question as to the duty and honesty required of corporate directors. He does not directly challenge the rule stated by the learned Trial Court, viz., "As directors, they were bound to subserve the interests of the company, and to hold its property for the common benefit of its creditors, and they were not privileged to strip it of its meager remaining resources for the purpose of recouping their private losses." (Trans. p. 141).

The Trial Court with the opportunity which it had of discovering the motives behind the actions of the Railway Syndicate had no difficulty in interpreting their actions, and its findings or conclusions as to the facts will not be lightly set aside by an appellate court.

Referring to the transaction in September, 1912, the Court says (Trans. p. 137) :

“At this time it is clear they (the Syndicate) had reached the conclusion that the Power Company was hopelessly insolvent, as was undoubtedly the case, and that their contract to purchase (second mortgage bonds) was ill-advised, and their original plan could not be profitably carried out.”

Again referring to this agreement, the Court says (Trans. p. 139) :

“That under the circumstances such an agreement was thought by any one to be in the interest of the Power Company is wholly incredible. I cannot believe that an independent board of directors would have given to it a moment’s consideration.”

And again (Trans. p. 140) it says:

“There is but one rational explanation of the agreement, and that is that the interests in control of the Railway Company, and, through it, of the Power Company, having concluded that the latter was hopelessly insolvent, and that a reorganization was inevitable and a receivership probable, resorted to this expedient for saving to themselves as much of the wreckage as possible.”

In face of these positive and unqualified findings and conclusions as to the facts (and they are amply sustained by the record), it is useless to cite or re-

view authorities, as *amicus curiae* has done, bearing upon the right of directors to take security for advances fairly and honestly made by themselves in the interest of the company and its creditors and with no ulterior motives.

The attention of the court has been very urgently called in the brief of the Railway Company, as well as in that of the *amicus curiae* to the case of *Atwood v. Shenandoah Railroad Company*, 85 Va. 966, where a first mortgage provided for the issue of bonds up to \$15,000.00 a mile upon a railroad, followed by a second mortgage authorizing issues up to a total of \$25,000.00 a mile, and where a part of the bonds under the first mortgage which had not been sold were certified and delivered to the trustee under the second mortgage as additional security. This was one of the provisions of the second mortgage and the provisions of the first mortgage that bonds might be issued thereunder up to not to exceed \$15,000.00 a mile were fully complied with. Upon foreclosure the holders of the first mortgage bonds which had been sold objected to the participation of the bonds under the first mortgage, which had been pledged to the trustee under the second mortgage. The line of road covered by the second mortgage was of greater extent than that covered by the first mortgage and it seems that the first mortgage bondholders sought to assert a lien over the entire line. The court seems to have been entirely justified in the statement that the claim was preposterous.

Counsel urges that this case not only illustrates

but is precisely analogous to the case at bar. Wherein this analogy resides it is difficult to say. Counsel says (p. 118) "Had these 718 bonds been delivered to the trustee under the Power Company's second mortgage the situation of the two cases would be absolutely identical." But how does that suggestion assist the court in this case? It supposes an utterly different situation. The 718 bonds were not delivered to the trustee under the second mortgage nor were there any provisions under either the first mortgage or the second that any such thing might be done. The first mortgage provides upon what terms and for what uses bonds may be certified and delivered under it. No one disputes that the 718 bonds might have been sold by the Power Company in good faith in the course of business and the proceeds applied to the corporate purposes. The missing cog in all these oft repeated arguments in these lengthy briefs is that they persistently ignore the essential distinction between a transaction had in good faith by a board of directors exercising their honest judgment in handling the affairs of the company and a transaction which it is "inconceivable any independent board of directors would have for a moment considered", entered into for the exclusive benefit of the directors themselves and constituting one of a series of acts that it is absolutely impossible to regard as conceived and carried out except with a fraudulent purpose and with a fraudulent intent.

With respect to the suggestion that the directors

would have neither moral or legal right to have offered the first mortgage bonds to the public without a full statement of the company's condition and that with such a statement they could not have been sold, we wish the court to distinguish between the undoubted insolvency of the Power Company and the equally undoubted insolvency of the Railway Company and the solvency and financial resources of the syndicate. No one doubts that the syndicate could have supported one or the other, or both of these companies for an indefinite time if it had desired to do so. The Power Company was, to be sure, insolvent on September 25, 1912, but whether it should suffer the consequences of that insolvency depended wholly upon the will of the Railway Syndicate. The ability, therefore, of the Railway Company to loan the Power Company \$250,000.00 is no evidence whatever of the solvency of the Railway Company. The Railway Company was rotten to the core and its property was worth but a small fraction of the face of its bonds; *but its bonds were all held by the Syndicate*. It would collapse the moment the Syndicate ceased to feed money into its hopper but not until then. It would collapse as soon as it was known it could not carry out the schemes to appropriate the property of the Power Company. A receiver was appointed for the Idaho-Oregon and with that appointment the scheme of the Railway Syndicate for the immediate acquisition of the property and revenues of the Power Company was doomed. The Railway Company went into the hands of a receiver thirteen

days after the appointment of the receiver for the Power Company.

In these arguments we were leading to the reflection that whether the first mortgage bonds of the Power Company were salable or might properly have been sold to the public in the fall of 912 depended solely upon the will of the Railway Syndicate. The Railway Syndicate had it in its power to make the bonds absolutely good. If they had gone on and completed the Ox Bow, made the company independent of the Railway Company as to a supply of power, declared their intention to treat their second mortgage bonds as being subordinate to the first mortgage bonds until the Power Company's revenues had increased, and to continue to pay the interest on the first mortgage bonds out of this revenue, (and they were ample for that purpose) the first mortgage bonds themselves were and would have been perfectly good. Therefore whether it was both possible and honorable to sell the 718 bonds to the public at a good price depended solely upon the will and purposes of the syndicate. They had for nearly two years used the Railway Company as a competitor of the Power Company and for the purpose of depreciating its revenues and the value of its property to the end that when the Power Company was completely linked and subordinated to the Railway Company a consolidation could be readily effected.

We have adverted to the theory that the 718 bonds were the "property" of the corporation and that their certification constituted "issue" thereof. Coun-

sel seriously urges that the 718 bonds if they had not been delivered to the Railway Company would have been in the treasury of the Power Company and they would have been the "property" of the Power Company and entitled to share in the distribution at the foreclosure sale; and by some method of reasoning which we can not follow, the conclusion is arrived at that the situation of the parties would then have been the same as it is with the 718 bonds in the possession of the Railway Company. We unhesitatingly characterize as absurd the proposition that the unissued and undelivered notes of a corporation shall be issued in case of insolvency and foreclosure so as to swell the mortgage debt and allow the insolvent mortgage debtor to share in the proceeds of the sale of its own property. If the 718 bonds are in the possession of the maker thereof and have never been delivered for value, they are simply pieces of paper and represent nothing. If, however, this novel theory should be adopted, counsel is reminded that the mortgage to the State Bank covers all the property of the Power Company of every kind and description, existing at the time of the mortgage and thereafter acquired, and that therefore if the 718 bonds were the "property" of the Power Company they would be covered by the mortgage and the distributive share thereof would be a part of the property to be sold under the mortgage. And so we have the *reductio ad absurdum* to be expected from the application of such a theory.

The only case cited by counsel to support the the-

ory that the 718 bonds should share in the proceeds of the sale is the United Box Board case in a *nisi prius* court in New York city which counsel explains has been reversed. We have not the report of the case before us at the moment but if there is any validity in the reasoning by which it was concluded that the \$16,000.00 of bonds in the treasury of the company were entitled to participate in the proceeds of the sale, that validity must manifestly depend upon some special situation which requires such a finding in order to do equity. It does not appear that the court of appeals approved the theory that the \$16,000.00 of bonds were entitled to participate.

VI.

We do not wish to add to what we have said in our former brief with respect to the allowance by the court of \$110,000.00 to the Railway Company and the claim of the Railway Company that it should have been allowed \$250,000.00. In our principal brief we refer to and quote from the record showing, as we believe conclusively, that the Railway Company had succeeded to all the rights of the "bankers" under the original Syndicate agreement of September, 1911, and had concurrently assumed the obligations of the bankers. Naturally the transactions between the Syndicate and its creature the Railway, are for the most part known only to them, but the record shows that a few days after the meeting of September 25th a formal writing was executed between the bankers and the Railway Company evidently for the purpose not of creating any new rela-

tions but of reducing to writing an existing and well understood status, and reference to an earlier agreement made in April, 1912, helps to show that the various writings between the parties did not create relations but recognized and reduced to writing existing relations. What we do know absolutely is that the Railway Company became the owner of the Idaho-Oregon second mortgage bonds as fast as they were acquired by the bankers, and issued its own bonds against them, par for par, which bonds issued by the Railway Company were not issued to Kissel-Kinnicutt & Company but to the Syndicate.

It is absurd to suppose that Kissel-Kinnicutt & Company was standing in the breach and buying Power Company's bonds and remaining under continued obligations to buy more and turning over all the proceeds of the transaction to someone else without a corresponding obligation being assumed by the other party. This whole argument is evidently a mere evasion. It was not made in the Trial Court and is resorted to here in the hope of escaping through a crack. The court will have no difficulty in concluding that Kissel-Kinnicutt did not in September, 1911, contract for themselves, but contracted for a Syndicate which unquestionably had a Syndicate agreement already in existence under which all the money needed was not paid in by Kissel-Kinnicutt but by the syndicate; that the Railway Company was organized to take and own, and did take and own, all the property of every kind acquired by the uses of the Syndicate, issuing therefor its bonds to

the Syndicate and donating or issuing its stock in round millions to evidence the prospective rake-off. The Syndicate in turn doubtless financed its requirements, not by going into the individual pockets of its members but by taking the Railway bonds and hypothecating them with the related, interested, and associated bankers. It is a beautiful little scheme whereby the public furnishes the money and the exploiter takes the profits.

There is no analogy between the case at bar and the cases cited by counsel in the latter part of his brief, and the cases there cited are not authority for releasing the bankers or any purchaser of bonds from a contract to take an issue of bonds at a certain price, simply because after they have taken about 90 per cent of the issue they have concluded the contract was unwise and the bonds were not as good as they supposed at the time the contract was entered into. The doctrine of stoppage *in transitu* has no application to contracts of this kind. If it had, nearly all contracts for the purchase of bonds could be rescinded by the bond house before they are completed. For there is rarely a case, where, if the financing contract be broken, the partially constructed works will sell for sufficient to pay the bonds that have been issued and sold.

In the case at bar the bankers expressly recognized their obligation to pay the remaining \$140,000.00 (Trans. Exhibit "A", p. 112). The transactions releasing the Railway Company and the bankers from the obligation of paying the \$140,000.00

and the loan of \$250,000.00, and the exchange of second mortgage bonds for first mortgage bonds, were all contemporaneous, and constitute in fact and in law but one transaction. They were an important part of a fraudulent scheme to wreck the Power Company for the benefit of the Railway Syndicate; and we again submit that the only error committed by the Trial Court was in holding that the Railway Company was entitled to hold the bonds, of which it thus fraudulently obtained possession, as security for the \$110,000.00 which it advanced the Power Company under the illegal acts referred to.

We respectfully submit that the decision of the Trial Court on this feature of the case should have been that the Railway Company having through improper and fraudulent motives and illegal acts obtained possession of the first mortgage bonds, it should in no wise profit by any of its acts, but should return the bonds to the Power Company; and if this places it in a position where it has not sufficient security for the \$110,000.00 it has no one to blame but itself. It is in no worse position than many other creditors who have honestly and through proper motives advanced money or extended credit to the Power Company. Such rule would be conducive to honest corporate management, and it is sustained by sound public policy and well recognized principles frequently applied to participants in fraudulent transactions.

The conclusions reached by the learned District Judge as to the fraudulent character of the transac-

tions in question are amply sustained by the record. Through his intimate knowledge of the entire situation, because of the many phases of this controversy that have been before him, he was in a position to fairly construe the acts and the motives of the parties.

This is peculiarly a case for the application of the rule that when the trial court has considered conflicting evidence and made a finding or decree, it is presumptively correct and will be permitted to stand, unless an obvious error has intervened in the application of the law, or some serious and important mistake appears to have been made in the consideration of the evidence.

Snider v. Dobson, 21 C. C. A. 76, 74 Fed. 758.

McKinley v. Williams, 20 C. C. A. 312, 74 Fed. 94, 102.

Gage v. Smyth Merc. Co., 87 C. C. A. 377, 160 Fed. 425.

Coder v. Arts, 82 C. C. A. 91, 152 Fed. 943.

McDonald v. Campbell, 81 C. C. A. 101, 151 Fed. 743.

Barton v. Texas Produce Co., 69 C. C. A. 181, 136 Fed. 355.

Hussey v. Richardson, etc. Co., 78 C. C. A. 370, 148 Fed. 598.

Stuart v. Hayden, 18 C. C. A. 618, 72 Fed. 408.

Paxson v. Brown, 10 C. C. A. 135, 61 Fed. 883.

Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664.

Davis v. Schwartz, 155 U. S. 631, 39 L. Ed. 289.

Kimberly v. Arms, 129 U. S. 512, 32 L. Ed. 764.

Hardin v. Union Trust Co., (C. C. A. 8th Circuit), 191 Fed. 152.

We realize that this discussion lacks connection and orderly sequence, but it has seemed impracticable to reply to the extended brief of the *amicus curiae* except by following it through and discussing *seriatim* such matters as seemed to require any reply from us.

We desire again to emphasize what we stated at the beginning, that counsel who appears as *amicus curiae* is in fact representing parties directly interested in the case, and his brief should therefore be read in the light of his partizanship and interest in the cause. We are also impressed with the fact that the authorities cited or quoted in the brief should be examined by the court, and not accepted at the value placed upon them by counsel, or as justifying the conclusions which he asserts.

It is important also that the decision and decree be considered as having been rendered after sale and upon distribution of the proceeds and upon application of the Railway Company to share equally with other bondholders in the proceeds of the sale, and as against objection thereto made by the intervening bondholders, and this was the stipulation in open court before the decree was signed (Trans. 163). When so viewed and when the record and the related

facts are all considered, we are impressed with the fact that appellants' conduct falls far short of bringing appellants within the rule so aptly stated by an eminent authority on Equity Jurisprudence: "*Nothing can call forth this court into activity but conscience, good faith and reasonable diligence.*"

Truly there can be no fear or apprehension under the record in this case that "too much conscience, if not too much learning," as suggested by *amicus curiae*, will make the members of the Railway Syndicate mad.

Respectfully submitted,

JOSEPH CUMMINS,
RICHARDS & HAGA,
Solicitors for A. W. Priest et al.,
Bondholders' Committee.

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY, LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a Bondholders Committee, W. J. FERRIS as Receiver of IDAHO-OREGON LIGHT & POWER COMPANY, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE and CHARLES M. SMITH, Interveners, and Being a Protective Committee for the Holders of the First and Refunding Bonds of the IDAHO-OREGON LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver, BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES OF AMERICA, IDAHO, POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Cross-Appellees.

Petition for Re-Hearing.

JOHN F. MacLANE,

Solicitor for Idaho Railway, Light & Power Company and O. G. F. Markhus, as Receiver of Idaho Railway, Light & Power Company, Appellants.

Filed

SEP - 5 1915

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY,
LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver
of IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B.
CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES,
EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD,
Personally and as a Bondholders Committee, W. J. FERRIS, as
Receiver of IDAHO-OREGON LIGHT & POWER COMPANY,
UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COM-
PANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE
ELECTRIC & MANUFACTURING COMPANY, A. H. SUNDLES and
AMERICAN STEEL & WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES,
EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN
R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L.
PARMELEE and CHARLES M. SMITH, Interveners, and being a
Protective Committee for the Holders of the First and Refunding Bonds
of the IDAHO-OREGON LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARK-
HUS, Receiver of IDAHO RAILWAY, LIGHT & POWER COM-
PANY, IDAHO-OREGON LIGHT & POWER COMPANY and W. J.
FERRIS, Its Receiver, BANKERS TRUST COMPANY, F. N. B.
CLOSE, UNITED STATES OF AMERICA, IDAHO POWER &
LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTING-
HOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H.
SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Cross-Appellees.

Petition for Rehearing.

Now comes Idaho Railway, Light and Power Com-
pany and O. G. F. Markus, as Receiver thereof, and,
by their solicitor, John F. MacLane, respectfully peti-

tion this Honorable Court for a rehearing of the above entitled cause upon the ground that the said Court has, in its previous consideration thereof, overlooked the following points:

FIRST: That, as your petitioners understand its conclusions, they are based primarily upon a finding that, as a matter of fact, the Idaho-Oregon Light and Power Company was insolvent on September 25, 1912, and that the contract then made between the Idaho-Oregon Railway Company and the Bankers was made in contemplation of a reorganization or readjustment of its securities or corporate relationships.

Your petitioners respectfully allege and show that there is in the record no evidence of insolvency of the said corporation in September, 1912, in the sense that it had then been determined that its corporate business could not or would not be continued, and that this Honorable Court has based its contrary conclusion upon an erroneous assumption as to the existence of such facts. The opinion of the Court states that:

“ It appears that the appellants conceded in the court below that on September 25, 1912, the directors of the Railway Company had come to the conclusion that the Power Company could not go on with its business, and that the course then inaugurated and subsequently pursued was adopted by the directors for the purpose of protecting themselves ‘as they had a right to do.’”

Your petitioners respectfully show that, so far as they can learn, the foregoing statement in this Court's

opinion is based upon the following statement—found at pages 11 and 12 of the Brief in Reply on behalf of the appellees, viz. :

“ Upon the trial in the District Court counsel for the Railway Company, consistently with the Railway Company’s attitude throughout the trial and consistently with the present attitude as shown by the foregoing quotations from the Railway Company’s brief, stated upon the argument that the Railway people at the time of the first transaction involving an exchange of bonds on September 25, 1912, had come to the conclusion that the Idaho-Oregon Company could not go on with its business, and that the course then inaugurated and subsequently pursued was in pursuance of that conclusion and adopted for the purpose of protecting themselves, *as they had a right to do.*”

Your petitioners further show that the said statements contained in the said brief of appellee’s counsel are not supported by reference to any part of the record, and that the Court will search the record in vain for any justification therefor.

This Honorable Court, in its opinion, further states that :

“ It is true that there is in the record no direct or positive testimony that at any time in the year 1912 the directors of the Power Company admitted its insolvency, or that they then contemplated immediate insolvency, but there is suffi-

cient to show that the Company, to their knowledge, was in financial embarrassment and in failing circumstances; that its income was insufficient to meet its obligations and current expenses; that, *in view of the competition which was presented, its directors saw no way of escape from immediate insolvency unless by a scheme of reorganization or possible consolidation with the competing company.*"

Your petitioners respectfully show that the Court fell into error in making the portion of the foregoing statement which is italicised; that the record contains no evidence supporting the statement, but, on the contrary, that the evidence in the case shows that the officers and directors of the Idaho-Oregon Light and Power Company, both in September and in December, 1912, considered and expected that the said Company would be maintained as a going concern without thought or expectation of reorganization or consolidation.

That the fact that the corporation was in financial embarrassment and in failing circumstances and that its income was insufficient to meet its obligations and current expenses is insufficient evidence of insolvency upon which to predicate the right of a creditor to avoid a particular transaction, is abundantly established by the following cases:

Coler v. Allen, 114 Fed. 609 (decided by this Court).

Damarin v. Huron Iron Co., 47 Ohio St. 581.

Wilmott v. London Celluloid Co., L. R., 34 Ch. Div. 147.

SECOND: The opinion of this Court further states that:

“ While the directors of a corporation are not trustees for bondholders in the sense that they are trustees for stockholders, it does not follow that bondholders shall be denied protection against the acts of directors, *the intention and effect of which is to depreciate the bonds contrary to the terms of the mortgage under which they are issued.*”

Your petitioners respectfully show that, from the foregoing quoted statement and particularly the italicised portion thereof, they understand this Court to have found that the acts of which the appellees complain were contrary to the terms of the mortgage under which the bonds held by the intervenors were issued and were intended to depreciate the value of such bonds. Your petitioners respectfully show that, in reaching such conclusion, this Honorable Court overlooked the following points, viz.:

(a) That the 718 bonds had been *duly issued* at the time of the transactions of which complaint is made.

\$24,000 of the bonds in question had been issued for the purpose of retiring underlying bonds (record, p. 397); the balance of the bonds involved had been issued either for the purchase or acquisition of other property, the payment of outstanding indebtedness secured by a lien on the properties purchased, or for ninety per cent. of

amounts expended by the company for additions, improvements or extensions (record, pp. 390-393).

The distinction between the *issuance* and *disposition* of the bonds is a vital one insofar as the interests of the intervenors are concerned, because they were parties to the contract which regulated such issue and, therefore, are entitled to complain if, as the Court appears to have considered, it was violated. Having, however, been properly issued, the interest of the intervenors in the bonds ceased and the question of their proper disposition became one between the corporation and those who acquired them. The distinction is taken in the case of *Keystone National Bank v. Palos Coal Co.*, 43 So., 570 (pp. 122 and 123 of brief of *amicus curiae*), where (p. 571) the Court said:

“While the bill prays specifically for the annulment of certain bonds held by the respondents, the relief sought in this respect is inappropriate to the fact stated in the bill. The bond issue was for corporate purposes and benefits, and was made under corporate authority, and it is not contended. As shown by the facts stated in the bill, that there was any illegality in the issue of the bonds. *The facts stated do not show an illegal issue, but rather an illegal disposition of the bonds after the same had been legally issued.* If the bonds were hypothecated without consideration, and in this manner parted with and disposed of, this would be a corporate wrong. The remedy in such a case, it would seem, would not be the annulment of the bonds, but a restora-

tion of the bonds to the rightful custodian, and *the relief should be sought and had in the name of the corporation.*"

(b) If the bonds were an obligation of the corporation at the time of the transactions in question, such transactions could not have resulted in depreciating the value of the intervenors' bonds.

It is respectfully submitted that the Court has overlooked the case of *Trust Company of America v. United Box Board Co.*, 162 N. Y. App. Div., 855, cited and referred to at pages 129–132 of the brief of *amicus curiae*, where it seems to have been held that bonds issued against the acquisition of property, although in the possession of the mortgagor company or its successors, are entitled to participate in the distribution of the proceeds of the sale of the mortgaged property to the same extent as bonds of the same issue in the hands of third persons.

(c) The learned Court appears to have overlooked the case of *Bank of Toronto v. Cobourg, etc., Ry. Co.*, 10 Ont., 376, referred to at length at pages 105–110 inclusive of the brief of *amicus curiae*, where were advanced precisely the contentions made in behalf of the intervenors and precisely the arguments submitted on behalf of the appellants, and where a conclusion was reached, as your petitioners respectfully submit, directly contrary to that heretofore announced by this Court.

(d) That the Court has overlooked the case of *In re Regent's Canal Iron Works Co.*, 3 Ch.

Div., 43, referred to at pages 111-113 of the brief of *amicus curiae*, in which, so far as the principle involved is concerned, as your petitioners respectfully submit, precisely the same question was presented as in this case, and in which a conclusion was reached directly contrary to that heretofore announced by this Court in this case.

THIRD: Your petitioners respectfully submit that this Court has overlooked the fact that none of the cases cited in its opinion hold that a bondholder may complain of the disposition by the mortgagor of bonds of the same issue after they have been duly issued and placed in the possession of the mortgagor.

From the report of *Richardson v. Greene*, 133 U. S. 30, it is difficult to determine what parties raised particular issues. As, however, there were before the Court those entitled to present the issues determined and the opinion does not suggest that the facts require the Court to distinguish between the *issuance* and *disposition* of bonds, it is only proper to assume that, if bondholders presented any of the questions there determined, their position was that the transactions which are complained of resulted in an improper issue of the bonds and, therefore, in a breach of their contract. In any event, a most careful reading of the case will disclose that the Court had no intention of stating or suggesting that any right of action to redress a corporate wrong can be asserted by bondholders.

Thomas v. Brownville & R. R. Co., 109 U. S. 522, contains no statement or suggestion that bondholders may redress a corporate wrong. On the contrary, after stating that transactions such as there under review

are not void, but voidable at the option of those whose interests are affected, the court (p. 524) says:

“ In the present case the stockholders of the corporation whose officers accepted those benefits at the hands of the parties with whom they were, in the name of the corporation, making a contract for over a million dollars, *do denounce and repudiate that contract.*”

McGourkey v. Toledo & Ohio Ry. Co., 146 U. S., 536, concerned the construction of a first mortgage and the determination whether or not particular property, sought by an arrangement between the corporation and its directors to be withheld from the lien of the mortgage, had come under such lien; and it was determined that the first mortgage covered the property in question. Obviously, that was a question in which the first mortgage bondholders were interested and its determination involved primarily the construction of their contract with the mortgagor. Accordingly, the language of the opinion in that case quoted by this Court, when considered in the light of the facts with which the Supreme Court was there dealing, is not authority for the proposition that bondholders are entitled to redress corporate wrongs.

Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. 7, and *Bosworth v. National Bank*, 64 Fed. 615, are cases of so-called inequitable preference. Both are grounded upon *Lippincott v. Shaw Carriage Co.*, 25 Fed. 577, and *Sanford Fork and Tool Co. v. Howe, Brown & Co.*, 44 Fed. 231, both of which were decided by Mr. Justice Woods, who appears to be re-

sponsible for the doctrine of so-called inequitable preference. Neither the *Consolidated Tank Line* case nor the *Bosworth* case mention the fact that the *Sanford Fork* case was reversed by the Supreme Court of the United States (157 U. S. 212), and, possibly, such reversal had not occurred when they were decided. Your petitioners respectfully submit that the doctrine of inequitable preference has not been accepted by the Supreme Court of the United States, and that, in view of the foregoing, the *Consolidated Tank Line* case and the *Bosworth* case are not controlling authorities bearing upon the questions at issue in the case at bar.

FOURTH: Your petitioners respectfully request this Court to reconsider generally Points IV and V as discussed in the brief of *amicus curiae*, upon the ground that the controlling authorities mentioned therein have been overlooked.

WHEREFORE, upon the foregoing grounds, the said appellants and petitioners respectfully pray this Honorable Court to grant a rehearing of said cause.

IDAHO RAILWAY, LIGHT AND POWER COMPANY and
O. G. F. MARKHUS, as Receiver of said Company,
by JOHN F. MACLANE,
their solicitor.

I, JOHN F. MACLANE, of counsel for the appellants named in the foregoing petition, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for purposes of delay.

JOHN F. MACLANE.

United States
Circuit Court of Appeals
For the Ninth Circuit.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and
CORNUCOPIA MINES COMPANY OF OREGON, et al.,
Respondents and Appellants,
vs.
JOHN L. BISHER, JR., by John L. Bisher, his guardian
ad litem,
Intervener and Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United
States for the District of Oregon.

Filed

JAN - 4 1915

F. D. Monckton,
Clerk,

United States
Circuit Court of Appeals
For the Ninth Circuit.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and
CORNUCOPIA MINES COMPANY OF OREGON, et al.,
Respondents and Appellants,
vs.
JOHN L. BISHER, JR., by John L. Bisher, his guardian
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States for the District of Oregon.

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HAMILTON TRUST COMPANY,

Plaintiff and Appellant,

vs.

CORNUCOPIA MINES COMPANY
OF OREGON,

Defendant and Appellant,

JOHN L. BISHER, JR., by John L. Bisher,
his Guardian *ad litem*,

Intervenor and Appellee.

Names and Address of Attorneys of Record:

Wood, Montague & Hunt, Spalding Building, Portland, Oregon, for Plaintiff and Appellant.

Emmett Callahan, Northwestern Bank Building, Portland, Oregon, for Defendant and Appellant.

C. A. Johns, Yeon Building, Portland, Oregon, and
Boothe & Richardson, Board of Trade Building, Portland, Oregon, for Intervenor and Appellee.

*In the District Court of the United States for the
District of Oregon.*

(IN EQUITY.)

HAMILTON TRUST COMPANY,
Complainant,

vs.

THE CORNUCOPIA MINES COMPANY
OF OREGON, et al.,

Respondents,

and

JOHN L. BISHER, JR., by John L. Bisher,
his Guardian *ad litem*,

Intervener.

Citation on Appeal.

UNITED STATES OF AMERICA to John L.
Bisher, Jr., by John L. Bisher, his Guardian ad
litem, Intervener herein, GREETING:

YOU ARE HEREBY NOTIFIED that in a cer-
tain case in equity in the United States District
Court for the District of Oregon, wherein Hamilton
Trust Company is complainant and The Cornucopia
Mines Company of Oregon, et al., are respondents
and appellants, and John L. Bisher, Jr., by John
L. Bisher, his Guardian ad litem, is Intervenor and
appellee, and appeal has been allowed the com-
plainant and appellants therein to the United States
Circuit Court of Appeals, Ninth Circuit.

You are hereby cited and admonished to be and
appear in said Court at San Francisco, California,
thirty days after the date of this citation, to show
cause, if any there be, why the order and decree ap-
pealed from should not be corrected and speedy
justice done the parties in that behalf.

WITNESS THE HONORABLE CHARLES E. WOLVERTON, Judge of the United States District Court for the District of Oregon, this 30th day of July, A. D. 1914.

CHAS. E. WOLVERTON,
United States District Judge.

Due service of the above citation on appeal by true copy thereof, is hereby accepted and admitted at Portland, Oregon, July 30th, 1914.

CHAS. A. JOHNS,
Of Intervenor's Attorneys.

Filed July 30th, 1914.

A. M. CANNON,
Clerk.

*In the Circuit Court of the United States for the
the District of Oregon.*

October Term, 1911.

BE IT REMEMBERED, That on the 5th day of
December, 1911, there was duly filed in the ~~DISTRICT~~
~~CIRCUIT~~ COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON, a Bill of
Complaint, in words and figures as follows, to-wit.

BILL OF COMPLAINT.

*In the Circuit Court of the United States for the
District of Oregon.*

(IN EQUITY.)

HAMILTON TRUST COMPANY,

Complainant,

vs.

THE CORNUCOPIA MINES COMPANY,
OF OREGON, a Corporation, and
VALENTINE LAUBENHEIMER and
S. W. HOLMES,

Respondents.

Foreclosure of Bonded Mortgage.

To the Honorable W. B. Gilbert, Charles E. Wol-
verton and Robert S. Bean, Judges of the above en-
titled Court:

Now comes your orator, Hamilton Trust Com-
pany, a corporation, by Williams, Wood & Linthi-
cum, its solicitors, and humbly complains against the

respondents, The Cornucopia Mines Company of Oregon and Valentine Laubenheimer and S. W. Holmes and shows to your Honors as follows:

I. That at all times hereinafter mentioned your orator was and now is a banking corporation duly created, organized and existing under and by virtue of the laws of the State of New York and has power to accept the mortgage hereinafter mentioned and to execute all of the trusts thereunder and hereinafter stated, and your orator at all the times hereinafter mentioned was and now is a citizen of the State of New York.

Ia. That at all times hereinafter mentioned the respondent, The Cornucopia Mines Company of Oregon (hereinafter for brevity called "The Mines Company") was and still is a corporation duly created, organized, existing and operating under and by virtue of the laws of the State of Maine, but has an agency duly established in the State of Oregon, according to law, for the transaction of its business in the State of Oregon, and Emmett Callahan of Baker City, Oregon, is its duly and regularly appointed officer designated as the one upon service may be made. And said respondent, The Mines Company, has paid all of its annual fees and dues and is regularly and duly licensed to do business in the State of Oregon, and the respondent, The Mines Company, during all the times hereinafter mentioned, was and now is a citizen of the State of Maine.

Ib. The respondent, Valentine Laubenheimer, is a citizen of the State of California.

Ic. The respondent, S. W. Holmes, is a citizen of the State of Washington.

II. That the said respondents, Valentine Laubenhimer and S. W. Holmes, are the only persons, other than your orator, claiming any interest in or against the respondent, The Mines Company.

IIa. That the respondent, Valentine Laubenhimer, as your orator is informed and believes and therefore so alleges, holds a judgment against the respondent, The Mines Company, in, to-wit, the sum of about \$8,000.00, which judgment was recovered in and stands of record in this Honorable Court and was entered on the Judgment Docket on the.....

.....day of....., 1911.

IIb. That a judgment in the sum of, to-wit, \$1,000.00 stands upon the judgment docket of the Circuit Court of the State of Oregon for the County of Baker, in the names of the respondent, S. W. Holmes, and against the respondent, The Mines Company, which judgment, as your orator is informed and believes and therefore so alleges has been fully satisfied and paid.

IIc. Your orator alleges that any claim or judgment whatever of the respondents, Valentine Laubenhimer and S. W. Holmes, is subsequent in time and inferior in equity to the claim of your orator against said The Mines Company as hereinafter more particularly set forth.

IIId. The amount involved in this dispute exceeds the sum of \$2,000.00, exclusive of interest and costs and is, to-wit, the sum of \$300,000.00.

III. The defendant, The Mines Company, ever since its incorporation has had full power and authority to own and possess the property conveyed by it and by the mortgage hereinafter mentioned, and therein set forth and hereinafter described, and had full power and authority to execute and deliver said mortgage for the purposes therein set forth, and the plaintiff had full power and authority to receive said mortgage and to accept the trusts created in and by the same.

IV. That on or about the 1st day of April, 1905, the said defendant, The Mines Company, in the due exercise of the powers and authority in that behalf possessed, and due corporate action having first been had, and for the purpose of making part payment for its mines, mining claims, equipment and properties, and discharging to that extent its obligations, did determine to issue its bonds to be known as its First Mortgage Six Per Cent Gold Bonds, consisting of six hundred (600) coupon bonds for Five Hundred (\$500) Dollars each, numbered consecutively from One (1) to Six Hundred (600) both inclusive, each payable to bearer, or the registered holder thereof, in gold coin of the United States of America, of or equal to the then standard of weight and fineness on the first day of April 1911 at the Hamilton Trust Company, in the Borough of Brooklyn, City of New York, State of New York, with

interest thereon from the 1st day of October, 1905, at the rate of six (6%) per cent per annum, payable in like gold coin, semi-annually on the 1st days of April and October in each year, upon presentation and surrender of the coupons annexed thereto as they should severally mature and become due.

And thereafter the defendant The Mines Company made and executed its certain bonds in the amount and numbered as aforesaid, of the aggregate par value of principal of Three hundred thousand (\$300,000) Dollars, bearing date the 1st day of April, 1905. By each of said bonds the defendant The Mines Company acknowledged itself indebted and for value promised to pay to the bearer, or if registered, to the registered holder thereof on the 1st day of April, 1911, at the Hamilton Trust Company in the Borough of Brooklyn, City and State of New York, the sum of Five hundred (\$500) Dollars the face value thereof in gold coin of the United States of America, of or equal to the then standard of weight and fineness, with interest thereon from the said 1st day of October, 1905, at the rate of six (6%) per cent per annum, payable in like gold coin semi-annually on the 1st days of April and October in each year upon presentation and surrender of the interest coupons thereto annexed, as they should severally mature and become due, until such principal sum was fully paid.

That the full Three hundred thousand (\$300,000) Dollars par value of bonds have been duly executed by The Mines Company, authenticated by the plaintiff and duly issued and delivered by it pursuant to the provision of the mortgage hereinafter mentioned,

and plaintiff is informed and believes that the said Three hundred thousand (\$300,000) Dollars of bonds executed by The Mines Company and authenticated by it and delivered as aforesaid, have been duly issued, negotiated and sold and all of the same are now outstanding, and valid obligations of the defendant The Mines Company, and that the same with the coupons annexed thereto, have come into the possession of a large number of persons for value, who are now the *bona fide* owners and holders thereof, the names of many of such persons being unknown to plaintiff.

V. That in order to secure the payment of the principal and interest of said bonds and the coupons thereto annexed, as the same should become due and payable and the performance and observance of all the other covenants, conditions and agreements on the part of The Mines Company contained in said bonds and the mortgage or deed of trust, the defendant The Mines Company in the further due exercise of the corporate authority by it in that behalf possessed, and due corporate action having been first had, for a valuable consideration first paid, made, executed and delivered to the plaintiff its certain mortgage or deed of trust, bearing date the 1st day of April, 1905, wherein and whereby it granted, bargained, sold, released, conveyed, assigned, transferred and set over unto the plaintiff, as trustee, and its successors and assigns in the trusts thereby created, all and singular the mines, mining claims, equipment and other property then held or acquired or thereafter acquired or held, and also all the easements, property, leasehold

rights and things of whatsoever name or nature then owned by The Mines Company or which might be thereafter acquired by it, the said property then in existence being specifically described in said mortgage or deed of trust as follows:

All and singular, the following mines, mining claims, equipment and properties, to-wit:

1. All that certain quartz lode mining claim known, located and recorded as the "Union," the same being designated by the Surveyor General as lot No. 310, embracing a portion of Sec. 28 T6 SR 45 E. W. M., and designated in the United States Land Office at LaGrande, Union County, Oregon, as mineral entry numbered 125, containing 19.27 acres more or less.

2. All that certain quartz lode mining claim known, located and recorded as the "Companion," the same being designated by the Surveyor General as lot No. 312, embracing a portion of Sec. 28 T6 SR 45 E. W. M., the same being designated in the United States Land Office at LaGrande, Union County, Oregon, as mineral entry numbered 124 and containing 12.57 acres more or less.

3. All that certain quartz lode mining claim known, located and recorded as the "Red Jacket," described as follows: Beginning at a corner post No. 1 S. 61.05 east 1563 feet from the quarter section corner between Sects. 27 and 28, T. 6 S. R. 45 E. W. M., marked corner No. 1, R. J. M. C. sur. No. 10, thence N. 15.1032 East 1353 feet to corner post No. 2, thence

N. 82 west 600 feet to corner post No. 3, thence S. 91.015 west 1339 feet to the corner post No. 4, thence S. 82 East 450 feet to place of beginning, designated by Surveyor General as lot No. 43, embracing a portion of sec. 28 T. 6 S. R. 45 E. W. M., certificate No. 68, and containing 16.13 acres more or less.

4. All that certain quartz lode mining claim known, located and recorded as the "Prescott," the same being designated by Surveyor General as Lot No. 313, embracing a part of Sec. 28 T. 6 S. R. 45 E. W. M., and designated in the United States Land Office at LaGrande, Union County, Oregon, as mineral entry numbered 126, and containing 11.60 acres more or less.

5. All that certain quartz lode mining claim known, located and recorded as the "Phoenix," described as follows: Commencing at monument at west and center of claim which is also at N. E. corner of Union Mine and S. E. corner of Companion Mine, thence northerly along east side line of Companion Mine 300 ft. to monument at N. N. corner of Phoenix claim, thence easterly 500 ft. to N. E. corner monument of claim, thence southerly 600 ft. to S. E. corner of claim, being also at N. center and monument of Lone Star U. S. Survey 219 westerly 500 ft. S. W. corner of claim on east side line of Union Mine, thence northerly 300 ft. along said Union side line to place of beginning, the same being designated by Surveyor General as lot No. 311, embracing a part of Sec. 28 T. 6 S. R. 45 E. W. M., and designated in the United States Land Office at LaGrande, Union

County, Oregon, as mineral entry numbered 128, and containing 5.52 acres more or less.

6. All that certain quartz lode mining claim known, located and recorded as the "Helena," the same being designated by Surveyor General as lot 314, embracing a portion of sects. 28 and 33 in T. 6 S. R. 45 E. W. M., and designated in the United States Land Office at LaGrande, Union County, Oregon, as mineral entry numbered 127, containing 17.47 acres more or less.

7. All that certain quartz lode mining claim known, located and recorded as the "Montana Consolidated," comprising the quartz lode claim known, located and recorded as the "Omer," "Montana," "Cliff," and "Butte," designated by the Surveyor General as lot No. 321, embracing a portion of sects. 21 and 28, T. 6 S. R. 45 E. W. M., and also designated in the United States Land Office at LaGrande, Union County, Oregon, as mineral entry numbered 134, and containing 40.89 acres more or less; for a more particular description of said Montana Consolidated reference is had to the location notice thereof recorded in Book F of quartz mining claims, page 402 of the Union County Records.

8. All that certain quartz lode mining claim known, located and recorded as the "Whitman," and designated by the Surveyor General as lot No. 37, embracing a portion of sects. 27 and 28 in T. 6 S. R. 45 E. W. M., said lot extending 1370 ft. in length along said lode and embracing 18.87 acres more or less.

9. All that certain quartz lode mining claim known, located and recorded as the "Alta" and designated as lot No. 38, embracing a portion of sects. 27 and 28 in T. 6 S. R. 45 E. W. M., said lot extending 1300 ft. in length along said lode.

10. All that certain quartz lode mining claim known, located and recorded as the "Bruin," designated as lot No. 39, embracing a portion of sec. 27 in T. 6 S. R. 45 E. W. M., said lot extending 1300 ft. in length along said lode and embracing 16.87 acres more or less.

11. All that certain quartz lode mining claim known, located and recorded as the "Eagle" and designated as lot No. 41, embracing a portion of sec. 27, T. 6 S. R. 45 E. W. M., said lot extending 1500 ft. in length along said lode, final mineral entry 48 for the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 27 N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ section 34, T. 6 S. R. 45 E. W. M. and embracing 20.66 acres more or less.

12. All that certain quartz lode mining claim known, located and recorded as the "Greek," designated as lot No. 40, embracing a portion of section 27, T. 6 S. R. 45 E. W. M., said lot extending 1600 ft. in length along said lode, and designated as lot No. . . . final mineral entry No. 49 for the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ section 34 E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ E. $\frac{1}{2}$ N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ section 27, T. 6 S. R. 45 E. W. M. and embracing 20.66 acres more or less.

13. All that certain quartz lode mining claim known, located and recorded as the "Annex Placer," designated as lot No. 42, embracing a portion of sec.

27 T. 6 S. R. 45 E. W. M., said claim embracing 6.73 acres.

14. All that certain quartz lode mining claim known, located and recorded as the "Motor," designated by the Surveyor General as lot No. 190, embracing a part of sects. 28 and 33 in T. 6 S. R. 45 E. W. M., certificate No. 155 and containing 3.92 acres more or less.

15. All that certain quartz lode mining claim known, located and recorded as the "Gore," designated by the Surveyor General as lot No. 320, embracing a part of sec. 28, T. 6 S. R. 45 E. W. M., certificate No. 154, containing 6.25 acres more or less.

16. All that certain quartz lode mining claim known, located and recorded as the "Last Chance" consolidated mining claim, consisting of all the divided north one-half of the "Last Chance" mine or mining claim and all of the "White Swan" mining claim, the location of said claim being of record in the records of Union County, Oregon, at Union, to which records reference is hereby made for a further description.

17. All that certain quartz lode mining claim consisting of the south one-half of the "Last Chance" quartz lode mining claim, being the original location of E. P. Howard and John Carey, and designated by the Surveyor General as lot No. 39, embracing a part of sec. 28, T. 6 S. R. 45 E. W. M., certificate No. 100 and containing 7.76 acres more or less.

18. All that certain quartz lode mining claim known, located and recorded as the "Moonshine,"

said mine being 400 ft. more or less in length by 600 ft. in width and lying between the "Maverick" fractional claim and the "Mayflower" quartz claim.

19. All that certain quartz mining claim or fractional quartz ledge, known, located and recorded as the "Maverick."

20. All that certain quartz lode mining claim known, located and recorded as the "Florence," described as follows: Commencing at the north end center monument of east side line of Union Mine and running thence northerly 300 ft. to the line of the "Prescott" mining claim, thence southwesterly 1500 ft. along line of said Prescott mining claim, thence 600 ft. southerly, thence 1500 ft. N. E. to the S. E. corner of the Union Mine, thence northerly 300 feet to place of beginning.

21. All that certain quartz lode mining claim known, located and recorded as the "Red Fox," and recorded in Book G. page 103, of Records of Quartz Locations, in the office of the clerk for Union County, Oregon, to which reference is hereby made for further description.

22. All that certain quartz lode mining claim known, located and recorded as the "Old Gray Fox," and recorded in Book G, page 103, of Records of Quartz Locations, in the office of the clerk for Union County, Oregon, to which reference is hereby made for further description.

23. All that certain quartz lode mining claim known, located and recorded as the "Dunn and Nor-

ton," said claim being located by Thomas H. Dunn and William Norton on May 4th, 1891, and recorded in Book F, page 302, of Records of Quartz Locations, in the office of the clerk for Union County, Oregon, May 12th, 1891, to which reference is hereby made for further description.

24. All that certain quartz lode mining claim known, located and recorded as the "Coup d'Or" and described as follows: Bounded on the south by the Main Elk Creek and the Spot Quartz Claim, on the west by the Hope Mill and Flagg Staff Mine and about one-fourth of a mile to the west from the Town of Cornucopia, being the same quartz lode mining claim granted by Lawrence Panter and Dominique Soldini, by Lawrence Panter, his attorney in fact, to John E. Searles, by deed recorded in Book 47 of Deeds, page 603, of Records of Union County, Oregon.

25. All that certain tunnel right or mining claim known as the "W. J. Clark Tunnel Claim," located by Wm. J. Clark on July 23rd, 1896, location notice whereof is duly recorded in Book F, page 409, of Records of Quartz Mining Claims of Union County, Oregon, to which reference is hereby made for further description.

26. All and singular that mill site known as the "Prescott Mill Site," consisting of five acres of non-mineral ground described as follows: Commencing at the S. E. corner of the Prescott Mining Claim and running thence southerly to Elk Creek, then up Elk Creek to east side line of Ohio Mining Claim, thence

northerly to S. W. corner of Prescott Claim, thence westerly along south end line of Prescott Claim to place of beginning, the location notice whereof was recorded in Book I of Mill Sites, page 126, Union County Records, to which reference is made for a further description.

27. All and singular that mill site known as the "Motor Mill Site," consisting of the triangular area of non-mineral land containing less than five acres, situated between the north end line of the "Motor" Mining Claim as officially surveyed, the west side of the Lone Star Claim and the east side line of the Lodi Mining Claim, the location notice whereof was recorded in Book I of Mill Sites, page 130, Union County Records, to which reference is hereby made for a further description.

28. All that certain piece or parcel of land more particularly described as follows: Beginning at a point on the half section line that is south 16.50 chains from the $\frac{1}{4}$ section corner on the north line of said section 3; thence south 7.15 chains and tracing said half section line; thence west 7 chains, thence north 7.15 chains, thence east 7 chains to the place of beginning. Containing 5 acres and being a portion of the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 3, Tp. 7, S. R. 45 E. W. M., and known as lot No. 3, situated in Baker County (formerly Union County), Oregon, and more particularly described on page 292, Book J, of the Deeds Records of Union County, Oregon, reference to which is hereby made for further description, said five acres being the same property conveyed to the

estate of John E. Searles by Alexander McDonald by warranty deed dated February 14, 1902, and recorded on February 28th, 1902, in Book 39 of Deeds, page 604, of the Records of Baker County, Oregon.

29. All that certain water right located by W. J. Clark and John E. Searles on August 26th, 1895, the location notice whereof is recorded in Book E of Water Rights, page 70, Union County Records, to which reference is hereby made for further description.

30. All that certain water right of 200 inches of the south branch of Elk Creek, located July 3, 1895, by W. J. Clark and John E. Searles, the location notice whereof was recorded in Book E of Water Right, page 70, Union County Records, to which reference is hereby made for a further description.

31. All that certain water right of 1,000 inches of the waters of Pine Creek, the location notice whereof is recorded in Book E of Water Rights, page 74, Union County Records, to which reference is hereby made for a further description.

32. All those two certain water rights, the one of 100 inches of water running from the spring known as the Union Spring, situated, lying and being immediately under the Union Mine, and the other of 100 inches of water to be used and taken from Fall Creek, said water rights being adjoining and adjacent to said mining claims, which were located by W. J. Burdette and which were conveyed by J. R. Farrell and wife to John E. Searles and William J. Clark by deed dated July 3d, 1895, and which deed

was on July 14th, 1896, recorded in the office of the County Clerk of Union County, Oregon, in Book C of Mining Deeds, on page 634, to which deed reference is hereby made for further description.

33. The buildings, structures, erections and constructions and all improvements now or hereafter placed upon any of the hereinbefore described property with their fixtures.

TOGETHER with all the machinery for the reduction of ore, mining machinery, mining tools and equipment, ore of all kinds and personal property located at Cornucopia or Baker City, Oregon, or on the property known as the Cornucopia Mines of Oregon or elsewhere now held or acquired or hereafter held or acquired for use in connection with the said Cornucopia Mines, or the business thereof; and also all the easements, property, leasehold rights and things of whatsoever name or nature now or hereafter connected with or relating to the said Cornucopia Mines, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, and also all the estate, right, title and interest, property, possession, claims and demand whatsoever as well at law as in equity of the Cornucopia Mines of, in and to the same and any and every part thereof, with the appurtenances. The personal property and chattels above conveyed and transferred or intended so to be, now held or hereafter acquired, shall be deemed real estate for all the purposes of this indenture and shall

be held and taken to be fixtures and appurtenances of the said Cornucopia Mines and part thereof and are to be used, and in case of a sale hereunder, are to be sold therewith.

TO HAVE AND TO HOLD all and singular the aforesaid real and personal property, mines, mining rights, water rights, mining machinery and tools, property and appurtenances hereinbefore mentioned and described or intended so to be unto the Trustee, its successor or successors in the trust forever for the equal and proportionate benefit and security of all holders of the bonds and coupons issued and to be issued under and secured by said mortgage or deed of trust, without regard to the time of the actual issue of said bonds, and for the enforcement of the payment of the said bonds and interest when payable according to the tenor, purport and effect of such bonds and coupons and to secure the performance and observance of and compliance with the covenants and conditions of said mortgage or deed of trust, without preference, priority or distinction as to lien or otherwise of one bond over any other bonds so that each and every bonds issued or to be issued under and by virtue of said mortgage or deed of trust shall have the same right, lien and privilege as every other bond issued or to be issued.

Plaintiff begs leave to produce upon the trial hereof the said mortgage or deed of trust and makes the same a part of its complaint, and prays that the same may be considered as though set forth at length herein and the contents thereof spread in full upon the face thereof.

VI. Plaintiff duly accepted the trust created in and by said mortgage, and in evidence of its acceptance thereof united in the execution of the same, and said mortgage was thereafter duly recorded in the office of the County Clerk and Recorder of Baker County, Oregon, where said mortgaged property was situated, on May 12th, 1905, in Book U, pages 488 to 518.

VII. That heretofore, to-wit, on or about the 1st day of April, 1906, the defendant The Mines Company, made default by neglecting and omitting to pay the interest mentioned in said bonds and coupons which became due and payable on said date amounting to \$9,000, and also, made default in the payment of the interest mentioned in said bonds and coupons which became due and payable respectively on the 1st day of October, 1906, amounting to \$9,000; the 1st day of April, 1907, amounting to \$9,000; the 1st day of October, 1907, amounting to \$9,000; the 1st day of April, 1908, amounting to \$9,000; the 1st day of October, 1908, amounting to \$9,000; the 1st day of April, 1909, amounting to \$9,000; the 1st day of October, 1909, amounting to \$9,000; the 1st day of April, 1910, amounting to \$9,000; the 1st day of October, 1910, amounting to \$9,000; the 1st day of April, 1911, amounting to \$9,000; although payment of all or some part of said installment of interest and coupons was duly demanded when the same became due. The total amount of such installments of interest was Ninety-nine Thousand (\$99,000) Dollars and the said defendant The Mines Company did not pay and has not paid or caused to be paid any of said interest or

the said coupons when they became due, and has not paid or satisfied or caused to be paid or satisfied, nor has any other person paid or satisfied said semi-annual installments of interest on said bonds or any part thereof, as aforesaid, in any manner, though payment thereof was duly demanded; and said The Mines Company has not furnished or provided or placed at the office of the Hamilton Trust Company, in the Borough of Brooklyn, City and State of New York, or elsewhere, any sum of money to pay said interest and interest coupons due as aforesaid, though the same were payable at the office of said plaintiff and thereby default has been made by the defendant The Mines Company in the performance of the conditions of its said mortgage dated April 1st, 1905; and that default in payment after demand duly made occurred more than six months since.

VIII. That heretofore, to-wit, on or about the 1st day of April, 1911, the defendant, The Mines Company, made default in the payment of the principal sum mentioned in said bonds which became due and payable according to the terms thereof and of said mortgage or deed of trust on said date, the total amount of which is \$300,000, and the said defendant The Mines Company did not pay and has not paid or caused to be paid the said principal sum or any part thereof, though payment thereof was duly demanded and said defendant The Mines Company has not furnished or provided or placed at the office of the plaintiff, Hamilton Trust Company in the Borough of Brooklyn, City and State of New York, or elsewhere, any sums of money to pay said principal

sum due as aforesaid, though the same was payable at the office of plaintiff aforesaid, and thereby default has been made by the defendant The Mines Company in the performance of the conditions of its said mortgage, dated April 1st, 1905.

IX. That in and by said mortgage, dated April 1st, 1905, of the defendant The Mines Company, it was provided that until default should have been made by it in the performance of any of the covenants and agreements in the said mortgage, and until such default should have continued for a period of six months, the mortgagors, or their assigns, the defendant The Mines Company, should be suffered and permitted to retain actual possession and manage, operate and use the property described therein and every part thereof and the appurtenances thereunto belonging, and to collect and receive and take the tolls, earnings, rents, issues, profits and other income thereof, and after paying the expenses of operating the mortgaged property and for necessary repairs, replacements, taxes and rentals out of said income, apply the balance to the payment of interest upon the bonds issued, and to the payment on account of the sinking fund therein provided for, and to such purposes as The Mines Company may deem proper.

It was further provided in said mortgage that in case default should be made in the payment of the said annual interest and of any of said coupons upon any of the bonds issued by the said Mines Company, secured by said mortgage, and such default should continue for six months or should The Mines Com-

pany make default in the payment of the principal of any of said bonds, then upon the request in writing of a majority in amount of the holders of the bonds secured by said mortgage and by notice in writing to The Mines Company, that thereupon the principal of all the bonds secured thereby should immediately become due and payable, anything contained in said bonds or said mortgage or deed of trust to the contrary notwithstanding.

It was further provided in and by said mortgage that the remedies provided therein were cumulative to the ordinary remedy of foreclosure in the courts, and the trustee might in its discretion and should, upon the written request of a majority in value of the outstanding and unpaid bonds which might have been issued thereunder, and whenever entitled so to do by the terms of said mortgage, institute proceedings to foreclose said mortgage.

X. That heretofore and on the 16th day of November, 1911, and more than six months after default of payment of principal and interest, plaintiff was requested in writing by a majority of the holders of the bonds thereby secured and then outstanding under said mortgage or deed of trust, to foreclose at law or in equity the said mortgage for failure of The Mines Company to pay the principal of the said bonds which became due and payable April 1st, 1911, and interest on the coupons due October 1st, 1905; April 1st, 1906; October 1st, 1906; April 1st, 1907; October 1st, 1907; April 1st, 1908; October 1st, 1908; April 1st, 1909; October 1st, 1909; April 1st, 1910;

October 1st, 1910; and April 1st, 1911; the said principal and interest coupons having been due and payable and having been presented at the place where the same were made payable, and payment of the principal and interest therein specified having been demanded, and to exercise its option to declare the principal of all of said bonds secured by said mortgage or deed of trust immediately due and payable, and forthwith to institute proceedings to foreclose said mortgage or deed of trust, and to secure the appointment by a court of competent jurisdiction, of a receiver of the property conveyed by said mortgage or deed of trust, and of the earnings, incomes, rents, issues and profits thereof.

Pursuant to the provisions of said mortgage made and executed by defendant, The Mines Company, to the plaintiff, and the waivers and requests aforesaid, plaintiff has elected to and does hereby declare the principal of all the bonds secured by said mortgage immediately due and payable, and it alleges that the principal of all said bonds and each of them has now become and is now due and payable as of the date of this bill of complaint.

XI. Plaintiff is informed and believes that the security so as aforesaid given to it for the payment of said bonds and the interest thereon is, in the present condition and situation of the mortgaged premises, inadequate to secure the payment of the said bonds with interest thereon, according to their tenor and effect.

Plaintiff further alleges, on information and belief, that the defendant The Mines Company is

wholly insolvent and unable to pay its just debts and liabilities in full, and that the mortgaged premises and property set forth in the said mortgage hereinabove recited, constitute one single plant with its appurtenances, property and franchises, and should not be dismembered or sold in sections or portions, and that the value thereof in sections or portions is and will be much less than the value thereof as a whole, and that a sale of the mortgaged premises, in separate parcels, could not, as plaintiff is informed and believes, be had without a sacrifice thereof and great loss to the plaintiff and the holders and owners of the bonds secured by the mortgage sought to be foreclosed herein.

XII. Plaintiff further alleges that no action other than this has been brought to recover any part of the mortgage debt hereinbefore set forth.

XIII. That the defendants above named and each of them have or claim to have some interest in or lien upon the said mortgaged premises, which interest or lien, if any, is subject and subordinate to the lien of the mortgage or deed of trust.

WHEREFORE plaintiff demands judgment:

1. That the above mortgage, dated April 1st, 1905, executed by defendant The Mines Company, may be foreclosed and that said mortgage may be decreed to be a lien upon the premises and property thereby granted and conveyed, and on all property connected with and appertaining to said mortgaged property.

2. That the defendant The Mines Company be decreed to pay the amount due upon the bonds secured by said mortgage, together with all costs and expenses and equitable charges in that behalf incurred and expended, and in default thereof that the defendants and each and all of them herein, and all persons claiming or to claim under them, or either or any of them, may be forever barred and foreclosed of and from all and every right and equity of redemption and claim of, in and to the said mortgaged property and every part and parcel thereof.

3. That all and singular the mortgaged property and premises, with the appurtenances, effects, incidents, additions and increase thereof, with all the rights, immunities, privileges and franchises mentioned in said mortgage hereinbefore described, may be sold in one parcel under final judgment or decree of this court.

4. That an accounting may be had wherein shall be ascertained and determined the amount due upon said bonds, and what allowances should equitably be made to the plaintiff as trustee, and that out of the moneys arising from the sale of said property under said decree, and after payment of the costs and expenses of sale and any allowance which may be made to the plaintiff and its attorneys and counsel, and any prior lien or incumbrance on said mortgaged premises, the amount of the balance may be applied to the satisfaction of the entire sum secured by said mortgage and paid over to the plaintiff as trustee, or to the holders of said bonds and coupons.

5. That the defendant The Mines Company, may be adjudged to be liable and may be required to pay to the plaintiff the amount of any deficiency which may remain after the application of such balance in the manner aforesaid.

6. That a receiver may be appointed by this court according to the course and practice of this court, with the usual powers of receivers in like cases, of all the mortgaged property and premises and franchises and the rents, incomes and profits thereof.

7. That an injunction may issue restraining the defendants and each of them and all other persons from interfering with, selling or disposing of any of said mortgaged property, and from taking possession of or attempting to sell, either by judicial process or otherwise, the said property or any part thereof; and that this plaintiff may have its costs, allowance and compensation for its services and expenses as trustee; and for such other and further relief, judgment or decree as to the court may seem just and equitable.

WILLIAMS, WOOD &
LINTHICUM,
ISAAC D. HUNT,
Attorneys for Plaintiff.

Office and Post Office Address:

State of New York,
City of New York,
Borough of Brooklyn,
County of Kings.—ss.

George Hadden being duly sworn, deposes and says, that he is the Vice President of the HAMILTON TRUST COMPANY, the plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this affidavit is not made by plaintiff is because plaintiff is a corporation; that deponent is an officer of said corporation, to-wit, the Vice President thereof.

Sworn to before me this 23rd day of November, 1911.

(Signed) GEO. HADDEN.

(L. S.) JOS. C. HECKER, Jr.,
Notary Public, Kings Co.

Filed December 5th, 1911.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 7th day of December, 1911, there was issued out of said court in said cause, a SUBPOENA ad RESPONDENDUM in words and figures, as follows, to-wit:

Subpoena Ad Respondendum.

I hereby certify and return that on the 5th day of December, 1911, I received the within writ and that after diligent search, I am unable to find the within named defendant, S. W. Holmes, (Defendant Holmes reported to be out of District), within my district.

LESLIE M. SCOTT.

Return on Service of Writ.

United States of America,

District of Oregon.—ss.

I hereby certify and return that I served the annexed Subpoena ad Respondendum on the therein named The Cornucopia Mines Company of Oregon, a Corporation, by handing to and leaving a true and correct copy thereof, together with the Bill of Complaint, with Emmett Callahan, who is statutory agent and attorney in fact to accept service for the above corporation in the State of Oregon, personally at Portland, in said district on the 5th day of December, A. D. 1911.

LESLIE M. SCOTT,

U. S. Marshal.

By LEONARD BECKER,

Deputy.

Return on Service of Writ.

United States of America,
District of Oregon.—ss.

I hereby certify and return that I served the annexed Supoena ad Respondendum on the therein named Valentine Laubenheimer by handing to and leaving a true and correct copy thereof, together with the Bill of Complaint with him personally at Portland in said District on the 7th day of December, A. D. 1911.

LESLIE M. SCOTT,
U. S. Marshal.

By A. C. PHELPS,
Deputy.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

*To The Cornucopia Mines Company of Oregon, a
corporation, and Valentine Laubenheimer and S.
W. Holmes,*

GREETING:

You, and each of you, are hereby commanded that you be and appear in said Circuit Court of the United States, at the Court Room thereof, in the City of Portland, in said District, on the first Monday of January next, which will be the 1st day of January, A. D. 1912, to answer the exigency of a Bill of Com-

plaint exhibited and filed against you in our said Court, wherein Hamilton Trust Company is complainant, and you are defendants, and further to do and receive what our said CIRCUIT COURT shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to Command you, the Marshal of said District, or your Deputy, to make due service of this our writ of Subpoena and to have then and there the same.

Hereof fail not.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 5th day of December in the year of our Lord, One Thousand Nine Hundred and Eleven, and of the Independence of the United States, the One Hundred and Thirty-sixth.

G. H. MARSH,
Clerk.

(Seal)

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The Defendant is to enter his appearance in the above entitled suit in the Office of the Clerk of said Court on or before the day at which the above writ is returnable; otherwise the Complainant's Bill therein may be taken pro confesso.

Returned and Filed December 11th, 1911.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 7th day of December, 1911, there was duly filed in said court, in said cause, a MOTION FOR THE APPOINTMENT OF A RECEIVER, in words and figures as follows, to-wit:

Motion for Appointment of Receiver.

Comes now C. E. S. Wood of Attorneys for the Complainant above named and here, now moves the Court for an order directing that receiver be appointed by this Court, according to the cause and practice of this Court, with the usual powers of receivers in like cases, of all the mortgaged property described in the Bill of Complaint herein and also the premises, franchises, rents increases and profits thereof. This motion is based on the Bill of Complaint, affidavit of Emmett Callahan and the papers and files in the above entitled matter.

C. E. S. WOOD,
of Attorneys for Complainant.

Filed December 7th, 1911.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 7th day of December, 1911, there was duly filed in said Court, in said cause, an Affidavit of Emmett Callahan, in words and figures as follows, to-wit:

Affidavit of Emmett Callahan.

United States of America,
State of Oregon,
Multnomah County.—ss.

I, Emmett Callahan, being first sworn according to law depose and say: That for about eight years last past I have been and so continue to be the general agent and attorney of the Cornucopia Mines Company of Oregon, one of the respondents above named; that within the past eight years I have frequently visited the mines, stamp mill and workings in the development of the mining claims and operating works of said Cornucopia Mines Company of Oregon, situate near the Town of Cornucopia, Baker County, Oregon; that I am familiar with the workings, operation and development of the mines and mining property of said Cornucopia Mines Company of Oregon, respondent; that for about eighteen years last past I have been engaged in personally and as an attorney for various mining companies in their operation and development in the states of California, Colorado, Montana and Oregon; that an action is now pending in this Court wherein the above named corporation is complainant against the above named respondents for the purpose of foreclosing mortgage bond against said respondent corporation, the Cor-

Cornucopia Mines Company of Oregon, for the purpose of satisfying the mortgage upon the premises described in the above named complainant's bill of complaint against the above named respondents for the sum of Three Hundred Thousand Dollars and the accruing interest stipulated in said mortgage; that said complainant in its said action to foreclose said mortgage against the respondents asked for the appointment of a receiver and the granting of an injunction therein; that it is necessary that said mines should continue in operation and development; that the said mines were closed down and ceased to be operated and developed great irreparable injury and loss would occur by said mines being closed down and not operated; that if said mines are not continued in operation and development the stamp mill, electric power plant, engines, pumps and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes and other underground openings and workings of said Cornucopia Mining claims and mines would cave in and be greatly damaged and great loss follow by the action of the elements and flooding of said openings in said mines and mining claims filling up with water deteriorating, destroying and damaging said mines and mining claims, its buildings and operating plants in a reasonably estimated sum of at least from forty to one hundred thousand dollars; that further said Cornucopia Mines Company of Oregon, one of the respondents above named, executed and entered into a lease of its said mines and mining claims as described in complain-

ant's bill of complaint with Robert M. Betts for the operation and development of said mines and mining claims for the period of one year commencing on or about the first day of November, 1911, and said mines are now being operated and developed by said Robert M. Betts as lessee under said lease.

EMMETT CALLAHAN.

Subscribed and sworn to before me this 6th day of December, 1911.

ISAAC D. HUNT,

Notary Public in and for Oregon.

(Notarial Seal)

Filed December 7th, 1911.

G. H. MARSH,

Clerk.

And afterwards, to-wit, on Friday, the 7th day of December, 1911, the same being the 57th Judicial day of the regular October, 1911, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Order to Show Cause Why Receiver Should Not Be Appointed.

Return on Service of Writ.

United States of America,

District of Oregon.—ss.

I hereby certify and return that I served the Order on the therein named Valentine Laubenheimer

by handing to and leaving a true and correct copy thereof with him personally at Portland in said District on the 9th day of December, A. D. 1911.

LESLIE M. SCOTT,

U. S. Marshal.

By A. C. PHELPS,

Deputy.

Now at this day the above entitled cause came regularly on to be heard upon the motion of the Complainant for the appointment of a receiver herein and Mr. C. E. S. Wood appeared of Counsel for Complainant:

WHEREUPON, IT IS HEREBY ORDERED, that the above named respondents do appear before this Court, at the United States Court Room in Portland, in said district, on the 21st day of December, 1911, if it be a court day, or else on the court day next following, at 10 o'clock A. M. of said day, then and there to show cause, if any, why a receiver should not be appointed herein according to the prayer of the bill in that behalf.

AND IT IS FURTHER ORDERED, that in the meantime and until the further order of the Court herein, the said respondents Valentine Laubenheimer and S. W. Holmes, their agents and servants, be and they hereby are severally restrained from issuing or causing to be issued any execution or executions upon the judgments set out in said bill.

Done in open Court this 7th day of December, 1911.

CHAS. E. WOLVERTON,

Judge.

Due service of the within order by certified copy as prescribed by law is hereby admitted at Portland, Oregon, December 7th, 1911.

EMMETT CALLAHAN,
Attorney for Respondent.

Filed December 7th, 1911.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 12th day of December, 1911, there was duly filed in said Court, and cause a Petition for order for service on non-resident defendant, in words and figures as follows, to-wit:

Petition for Service on Non-Resident Defendant.

To the Honorable Judges of the Circuit Court of the United States in and for the District of Oregon:

Comes now the Complainant, Hamilton Trust Company, above named and respectfully shows that this is a suit brought to enforce an equitable lien upon, or claim to, certain real and personal property described in complainant's bill of complaint herein, which said real property is situated within the district of Oregon, where the above entitled suit has been brought, and that respondent, S. W. Holmes, is a citizen and resident and inhabitant of the State of Washington, and resides in the Town of Ostrander in said state, and cannot be found within the district of Oregon.

That respondent, S. W. Holmes, has not voluntarily appeared herein, and that this is a cause which

comes within Section 73 of United States Revised Statutes as amended by the act of Congress of March 3d, 1875, Chapter 137, Section 8 (18 Statutes at Large 472).

And your petitioner respectfully prays your honorable court to make an order directing said absent respondent, S. W. Holmes, to appear, plead, answer or demur by a day certain to be designated, and directing that said order shall be served upon said absent respondent, S. W. Holmes, in the Town of Ostrander, in the State of Washington, or wherever he may be found.

HAMILTON TRUST COMPANY,
Complainant.

By C. E. S. WOOD,
of its Attorneys.

United States of America,
State and District of Oregon,
County of Multnomah.—ss.

I, C. E. S. Wood, being first duly sworn, depose and say that I am one of the solicitors for the complainant in the within entitled suit; that I have read the foregoing petition and know the contents thereof, and that the same is true to my own knowledge, except as to the matters therein stated to be on information and belief and as to those matters I believe it to be true; that I make this verification because the

complainant is a corporation and is not now a resident or inhabitant of the State and District of Oregon.

C. E. S. WOOD.

Subscribed and sworn to before me this 12th day of December, 1911.

(Seal) H. H. PARKER,
Notary Public in and for Oregon.

Filed December 12th, 1911.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on Tuesday, the 12th day of December, 1911, the same being the 61st Judicial day of the regular October, 1911, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order for Service on Non-Resident Defendant.

Now at this time the above entitled cause came regularly on to be heard upon petition of the Complainant for an order directing service upon respondent, S. W. Holmes, complainant, appearing by C. E. S. Wood of Counsel for the complainant, and the Court having fully considered said petition and being fully advised with reference thereto, and it appearing to the court from said petition and from the bill of complaint on file herein that this is a suit to enforce an equitable claim to or lien upon certain real and personal property described in complainant's bill of complaint herein, which said property is situated

within the District of Oregon, where the above entitled suit has been brought; and

It further appearing that the respondent, S. W. Holmes, is not an inhabitant of the State of Oregon, but is a citizen and resident and inhabitant of the State of Washington and resides at the Town of Ostrander in said state, and that he has not voluntarily appeared herein, and that this is a cause which comes within Section 73 of United States Revised Statutes as amended by the act of Congress of March 3d, 1875, Chapter 137, Section 8 (18 Statutes at Large 472), and that it is proper for this Court in accordance with said act of Congress as amended, to make an order directing the said absent respondent to appear, plead, answer or demur, by a day certain to be designated, and to direct the service of said order upon said respondent, S. W. Holmes, in person, within the State of Washington or wherever he may be found.

WHEREFORE, it is hereby ordered that S. W. Holmes, one of the respondents, be, and he hereby is directed to appear, plead, answer or demur to said bill of complaint of said complainant in the above entitled matter on or before the rule day of January, 1912, and that a certified copy of this order and the order to show cause on application for receiver herein, together with a copy of the bill of complaint, certified to be such by one of the solicitors of the complainant be duly served upon said respondent wherever he may be found on or before the 16th day of December, 1911, by the United States Marshal in and

for the Western District of Washington if found within said district or by the Marshal of that district or that state or territory of the United States wherever the said respondent may be found, if not found within the Western District of the State of Washington.

Dated this 12th day of December, 1911.

CHAS. E. WOLVERTON,
Judge.

Filed December 12th, 1911.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on Thursday, the 21st day of December, 1911, the same being the 69th Judicial day of regular October, 1911, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Appointing Receiver.

Now on this 21st day of December, 1911, comes the Complainant, the Hamilton Trust Company, by Williams, Wood & Linthicum, its solicitors, and it appearing that respondent, The Cornucopia Mines Company of Oregon and respondent Valentine Laubenheimer have been regularly served with the order to show cause herein, and it appearing that respondent S. W. Holmes has very little interest herein, and that the application for receiver herein is not resisted by any of said respondents, and the Court

having been fully advised in the premises, it is now hereby:

ORDERED, ADJUDGED AND DECREED that Robert M. Betts be and he hereby is appointed receiver of all and singular the real and personal property of the said The Cornucopia Mines Company of Oregon, covered by the mortgage sought to be foreclosed herein, and that said receiver be, and he hereby is, authorized and directed to take immediate possession of all and singular the said real and personal property, wherever situated or found, and to continue the operation of said mining and other property and every part and portion thereof, as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so.

IT IS FURTHER ORDERED that said receiver, within the next ten days, file with the clerk of this court, a proper bond with such surety or sureties to be approved by a judge of this court in the penal sum of \$2,500.00, conditioned for the faithful discharge of their duties, and to account for all the funds coming into his hands according to the order of this court.

Each and every of the officers, directors, agents, or employees of The Cornucopia Mines Company of Oregon, and all other persons or corporations, are hereby commanded to turn over and deliver to said receiver any and all of said property into his

hands, or into his control, and such and every of such officers, directors, agents, employees, persons or corporations, are hereby commanded to obey and conform to such orders as may be given to them from time to time by such receiver, in conducting the operations of said property and in discharging his duties as such receiver.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that out of the moneys that shall come into the hands of said receiver from the operation of said property or otherwise he shall pay the necessary expenses incident to the operation of said property and hold the remainder, if any there be, subject to the order of the court herein, and this appointment is made on condition that said Robert M. Betts shall not receive any compensation for his services as such receiver from any of the parties herein, and that he obey the order of the court as made from time to time.

Done in open Court this 21st day of December, 1911.

CHAS. E. WOLVERTON,
Judge.

Filed December 21st, 1911.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 23rd day of December, 1911, there was duly filed in said Court, and caused, a Return of Service of Order for Non-Resident Defendant to appear and plead, in words and figures, as follows, to-wit:

Return on Order.

United States of America,
State of Washington,
County of Pierce.—ss.

I, Joseph R. H. Jacoby, United States Marshal in and for the Western District of Washington, hereby certify that I served the order of the above entitled court made and entered on the 12th day of December, 1911, requiring the respondent S. W. Holmes, to appear, plead, answer or demur to the bill of complaint by the rule day of January, 1912, and also serve the order to show cause why a receiver should not be appointed, and also served the bill of complaint in the above entitled cause upon the above named S. W. Holmes, by delivery to him on the 14th day of December, 1911, personally, and in person, true copies of each of said orders certified to be such by the clerk of the above entitled court, and a true copy of said bill of complaint, certified to be such by Isaac D. Hunt, one of the solicitors for the complainant herein.

JOSEPH R. H. JACOBY,
United States Marshall in and for the
Western District of Washington.

By FRANK ALBERT, Jr.,
Deputy.

Tacoma, Wash., Dec. 15th, 1911.

Marshal's fees \$11.50.

Filed December 23rd, 1911.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 2nd day of January, 1912, there was duly filed in the District Court of the United States for the District of Oregon, in said cause, a Bond of Receiver, in words and figures as follows, to-wit:

Bond of Receiver.

KNOW ALL MEN BY THESE PRESENTS, that we, Robert M. Betts, as principal, and National Surety Company, a corporation, as surety, parties of the first part, are held and firmly bound unto the said The Cornucopia Mines Company of Oregon, Valentine Laubenheimer and S. W. Holmes, respondents in the above entitled action, parties of the second part, in the just and full sum of Two Thousand Five Hundred Dollars (\$2,500), for the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, and each of our successors, heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 21st day of December, 1911, upon conditions as follows:

WHEREAS, the said Robert M. Betts has been appointed by the above entitled court to act as receiver of all the real and personal property of said Cornucopia Mines Company of Oregon, to man-

age and operate the same as according to the order of said court;

NOW, THEREFORE, if the said Robert M. Betts shall well and faithfully discharge all of the duties incumbent upon him as such receiver, and account for all the funds coming into his hands as such receiver according to the order of this court, then this obligation to be null and void; otherwise to be and remain in full force and effect.

ROB'T M. BETTS, (Seal)

NATIONAL SURETY COMPANY,
(Seal) By HARRISON ALLEN,
Resident Vice-President.

NATIONAL SURETY COMPANY,
(Seal, National) Attest JAS. McI. WOOD,
(Surety Co.) Resident Secretary.

Filed January 2nd, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 22nd day of January, 1912, there was duly filed in said Court, and cause a Demurrer to the Bill of Complaint, in words and figures as follows, to-wit:

Demurrer.

The demurrer of The Cornucopia Mines Company of Oregon, a corporation, respondent, to the
BILL OF COMPLAINT.

And now comes the defendant The Cornucopia Mines Company of Oregon, a corporation, and not confessing any of the matters in the BILL to be true, demurs to the bill herein filed and says the same does not state any matter of equity entitling Complaint to the relief prayed for, nor are the facts as stated sufficient to entitle Complainant to any relief against this defendant.

WHEREFORE defendant prays the judgment of this Court whether it shall further answer, and that it be dismissed with its costs.

EMMETT CALLAHAN,
Attorney for Respondent Cornucopia
Mines Company of Oregon, a corporation.

I, Emmett Callahan, solicitor for respondent in the above entitled cause, do hereby certify that the foregoing demurrer, in my opinion, is well founded in law.

EMMETT CALLAHAN,
Solicitor for Respondent.

United States of America,
State of Oregon, Baker County.—ss.

I, Emmett Callahan, the attorney and general agent for respondent within the State of Oregon; and the only authorized agent and attorney, or other officer within Oregon authorized to represent said

respondent herein, being duly sworn, do say that the foregoing demurrer is not interposed for delay.

EMMETT CALLAHAN.

Subscribed and sworn to before me this 19th day of January, 1912.

O. B. MOUNT,

(Seal)

Notary Public for Oregon.

State of Oregon,

County of Multnomah.—ss.

Due service of the within demurrer is hereby accepted in Multnomah County, Oregon, this 22nd day of January, 1912, by receiving a copy thereof, duly certified to as such by Emmett Callahan, attorney for respondent Cornucopia Mines Company.

C. E. S. WOOD,

of Attorneys for Complainant.

Filed January 22nd, 1912. .

A. M. CANNON,

Clerk.

And afterwards, to-wit, on Monday, the 29th day of January, 1912, the same being the 71st Judicial day of the regular November, 1911, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Continuing Hearing on Demurrer.

This cause came on regularly at this time upon Demurrer and thereupon there being no appearance, it is ordered that hearing on Demurrer be and the same hereby is continued until Monday, February 5th, 1912.

And afterwards, to-wit, on Monday, the 5th day of February, 1912, the same being the 77th Judicial day of the regular November, 1911, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Decree Pro Confesso.

Now at this time comes on to be heard the demurrer heretofore interposed by the defendant Cornucopia Mines Company, and duly filed January 22nd, 1912, Mr. C. E. S. Wood appearing for the plaintiff Hamilton Trust Company, and Mr. Emmett Callahan appearing for the defendant Cornucopia Mines Company.

Whereupon the said defendant Cornucopia Mines Company submitted that the said demurrer should be overruled; and

IT IS ORDERED, ADJUDGED AND DECREED that said demurrer be and is hereby overruled; and that defendant Cornucopia Mines Company have leave to plead further.

Whereupon the said defendant Cornucopia Mines Company, by its attorney, refused to plead further, and confessed the bill and consented that a decree might be taken by the plaintiff, Hamilton Trust Company, against the defendant Cornucopia Mines Company, as prayed for in the bill.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that as against the defendant Cornucopia Mines Company, the bill be taken as confessed and that a decree be entered for the foreclosure of the mortgage lien of the plaintiff against the property of the defendant, Cornucopia Mines Company, and for such other relief as may be equitable in the premises, as prayed for in the bill.

And afterwards, to-wit, on Monday, the 12th day of February, 1912, the same being the 83rd Judicial day of the regular November, 1911, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Continuing Demurrer.

Now, at this time, demurrer called and ordered continued until Monday, February, 19th, 1912.

And afterwards, to-wit, on Friday, the 19th day of February, 1912, the same being the 89th Judicial day of the regular November, 1911, term of said

Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Overruling Demurrer.

Now, at this time, the demurrer herein came on regularly for hearing and thereupon said demurrer being called and there being no appearance and it appearing that this was the third call of said demurrer, it is ordered that said demurrer be and the same is hereby overruled.

And afterwards, to-wit, on Saturday, the 2nd day of March, 1912, the same being the 100th Judicial day of the regular November, 1911, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Decree Pro Confesso.

Now on this day of March, 1912, comes the complainant, Hamilton Trust Company, by Mr. C. E. S. Wood, of counsel, and moves the Court for a decree pro confesso herein against respondents Valentine Laubenheimer and S. W. Holmes upon the bill of complaint herein, and it appearing to the Court that the subpoena issued in this cause was duly and legally served upon respondent Valentine Laubenheimer on the 7th day of December, 1911, and upon respondent S. W. Holmes on the 14th day of December, 1911, by delivering to and leaving with each of said respondents personally on said dates an

attested copy of said subpoena, as shown by the returns of said service on file herein, and it appearing that said service was made on each of said respondents more than twenty days before the rule day of February, 1912, and it further appearing that said respondents, and each of them, have not appeared in this suit, either in person or by a solicitor, and that neither of said respondents has appeared in this suit at all, and both of said respondents have failed to answer or otherwise plead herein within the time allowed by law and the rules of this Court:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said bill of complaint herein be and the same hereby is, taken as confessed by the said respondents Valentine Laubenheimer and S. W. Holmes, and each of them.

And afterwards, to-wit, on Tuesday, the 30th day of April, 1912, the same being the 50th Judicial day the regular March, 1912, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Final Decree.

Now, on the 30th day of April, 1912, the above entitled cause came regularly to be heard at this term upon the bill of complaint herein, the decrees heretofore entered in this cause on February 5th, 1912, and March 2nd, 1912, taking said bill as con-

fessed by each and all of said respondents herein, and the motion of Mr. C. E. S. Wood, of counsel for complainant, for a final decree herein according to the prayer of said bill.

And it appearing that the bill in equity in the above entitled cause as filed in this Court on the 5th day of December, 1911, and that a subpoena was issued and duly served on all of the respondents herein; and that orders taking the said bill are confesso against said defendants were duly entered in this case on the 5th day of February, 1912, and on the 2nd day of March, 1912, in the order book, and that no proceedings have been had or taken by said respondents or any or either of them since either of said orders were entered, and more than thirty days having elapsed since the entering of said orders taking said bill pro confesso as aforesaid;

Now therefore, upon consideration of the said bill, and the evidence produced at the hearing thereof, and by reason of the default of said respondents, Valentine Laubenheimer and S. W. Holmes and respondent, The Cornucopia Mines Company, having consented that as against it, the bill be taken as confessed and that a decree be entered according to the prayer of said bill, it is by the Court in consideration thereof;

Ordered, adjudged and decreed, that on or about the first day of April, 1905, the respondent, The Cornucopia Mines Company of Oregon, a corporation, made and executed its certain bonds, wherein and whereby it promised to pay to the holder, or

holders thereof, on the first day of April, 1911, the sum of Three Hundred Thousand Dollars (\$300,000), with interest thereon from the first day of October, 1905, at the rate of six per cent (6%) per annum, payable semi-annually on the first day of April and on the first day of October in each year, and that all of said bonds have been duly issued, negotiated and sold, and all of the same are now outstanding and valid obligations of the respondent, The Cornucopia Mines Company, and for the purpose of securing the payment of the principal and interest of said bonds and the coupons thereto annexed and all other sums thereby to come due, made, executed and delivered to the plaintiff as set forth in the bill of complaint herein, its certain mortgage or deed of trust, bearing date the first day of April, 1905, wherein and whereby it granted, bargained, sold, released, conveyed, assigned, transferred and set over unto the complainant as trustee, all and singular the water rights, flumes, electric plant, mines, mining claims, equipment and all other property then held or acquired or thereafter held or acquired, and also all the easements, property, leasehold rights, and things of whatsoever name or nature then owned by the Cornucopia Mines Company, a corporation, or which might be thereafter acquired by it, the said property then in existence being specifically described in said mortgage or deed of trust as follows; all and singular, the following mines, mining claims, equipment and properties, to-wit:

For a description of the property foreclosed by this decree, see Bill of Complaint, pages ... to

That in and by the terms of said mortgage, said respondent covenanted and agreed to pay to the holder of any bond issued under and secured by said mortgage, the principal and interest accruing thereon, promptly as the same became due and also covenanted to pay all taxes and assessments, liens or charges, that might be levied or assessed upon the property covered by said mortgage, so that said mortgage should be kept a first lien upon all of said property until the obligations secured by said mortgage should be paid in full and said respondent The Cornucopia Mines Company, a corporation, thereby further covenanted and agreed that if it should fail to pay any of said sums of money as specified, or in any other respect should fail to comply with any of the said covenants the complainant might, at any time after the expiration of the time named in the mortgage, proceed to foreclose said mortgage to compel payment to be made of the full amount due and payable; and that in and by the terms of said mortgage it was further expressly agreed that should said respondent fail to make payment of any taxes or other charges payable by it, or suffer the property covered thereby to become subject to any lien or incumbrance having precedence of said mortgage, the complainant might at its option make payment thereof, and the amount so paid with interest at six per cent (6%) per annum shall be added to and become a part of the debt secured by said mortgage.

That complainant duly accepted the trust created in and by said mortgage, and in evidence of such acceptance joined in the execution of the same and said mortgage was thereafter on May 12th, 1905, duly filed for record in the offices of the County Clerk and Recorder for Baker County, Oregon, and recorded in Book U of Mortgages at pages 488 to 518, Mortgage Records of said county.

That no payment has been made on said bonds or any of them or upon said mortgage, although such payment was demanded when due and that there is now due and owing to the complainant as trustee from said respondent, The Cornucopia Mines Company of Oregon, on account thereof, said sum of Three Hundred Thousand Dollars (\$300,000), with interest thereon at the rate of six per cent per annum, payable semi-annually, from the first day of October, 1905, and the further sum of One Thousand One Hundred and Ninety-Two Dollars and Ninety-Three Cents (\$1,192.93), taxes paid by the complainant, as provided by the terms of said mortgage upon the property covered thereby, with interest thereon from the 15th day of March, 1912, the date of such payment, at the rate of six per cent (6%) per annum, and the further sum of Ten Thousand Dollars (\$10,000.00), which is by the Court adjudged to be a reasonable sum to be allowed as attorneys' fee for the benefit of the complainant herein.

That on the 16th day of November, 1911, and more than six months after default of payment of principal and interest, complainant was requested in

writing by a majority in amount of the holders of the bonds thereby secured, and then outstanding under said mortgage or deed of trust, to foreclose said mortgage for failure of The Cornucopia Mines Company, a corporation, to pay the amounts due upon said bonds and mortgage as hereinbefore stated, and to exercise its option to declare all of said sums immediately due and payable, and forthwith to institute proceedings to foreclose said mortgage.

That by order of the Court made and entered herein on the 21st day of December, 1911, Robert M. Betts was appointed receiver of all the property of said Cornucopia Mines Company, of Oregon, covered by said mortgage, and he has ever since continued to discharge his duties as such receiver.

That the mortgaged premises and property covered by said mortgage, constitute one single plant with its appurtenances, property and franchises, and the value thereof in sections or portions is and will be much less than the value thereof as a whole, and said property should not be dismembered or sold in sections or portions.

It is further ordered, adjudged and decreed that said complainant do have and recover of and from said respondent The Cornucopia Mines Company of Oregon the said sum of \$422,940.00, being the principal of said mortgage and interest as therein provided, and the said further sum of \$10,000.00, attorneys' fees, together with its costs and disbursements herein to be taxed, and that in default of such pay-

ment by said respondent, or by someone in its behalf, all of said mortgaged property hereinbefore described and all the right, title, interest of said respondent in and to the said property described in said mortgage or deed of trust, or which has since the date thereof been acquired by it, or the said receiver, or which may hereafter be acquired prior to the sale herein ordered, shall be sold by or under the direction of Ed. Rand, who is hereby appointed Special Master of this Court for said purpose, as one property, and not in separate parcels and in the manner hereinafter directed, to satisfy the amounts due, and to become due as aforesaid, for principal and interest on said outstanding bonds and the several sums herein allowed and decreed to be paid, or so much thereof as such property will bring upon such sale, and that Ed. Rand, master aforesaid, make such sale in accordance with the course and practice of this Court, and that at such sale the said complainant, or any of the holders of said outstanding bonds, may become the purchaser or purchasers at such sale; and that all of the property ordered to be sold under this decree shall be sold at public sale to the highest bidder, between nine o'clock in the morning and four o'clock in the evening, at the door of the court house of said Baker County, in the City of Baker, the county seat of said County; that notice of such sale shall be given by said master by publication thereof once each week for six successive weeks preceeding the date of sale in the Pine Valley Herald, a weekly newspaper of general circulation in said Baker County, in addition said no-

tice shall also be published at least once a week for six successive weeks in at least one daily newspaper of general circulation published in the City of New York, in the State of New York, and said notice shall contain a statement of the time and place of sale, the terms and conditions thereof as herein prescribed and a brief general description of the mortgaged property to be sold; and it is further ordered, adjudged and decreed that the purchaser or purchasers of said mortgaged property at such sale shall be entitled to use and apply in making payment of the purchase price any of the outstanding bonds secured by said mortgage as therein provided, but a sufficient portion of the purchase price shall be paid in cash to provide funds for payment of all costs and expenses incurred herein, and that the master return the cash proceeds of said sale to the Clerk of this Court and that the same be paid to the Clerk of this Court and upon the completion and confirmation by this Court of the sale made under and in pursuance of this decree the said Clerk of this Court shall pay out such moneys as follows:

1. The expenses of the sale of said property.
2. The expenses of the receivership herein.
3. The costs of this suit.
4. Complainant's attorneys' fees.
5. The taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.
6. All amounts due or to become due upon the bonds secured by said mortgage and in case such proceeds shall be insufficient to pay in full the whole

amount of principal and interest so due and unpaid on such bonds, then the proceeds shall be applied ratably upon the whole amount due according to the aggregate thereof without preference or priority of any part over any other part thereof.

7. The remainder, if any, to respondent, The Cornucopia Mines Company, of Oregon, its successors and assigns.

And it is further ordered, adjudged and decreed, that if the moneys arising from said sale shall be insufficient to pay the said costs, expenses, fees and all allowances made by this decree and the amounts due upon all of said bonds, then in such case said respondent, The Cornucopia Mines Company, of Oregon, shall pay to said complainant the amount of such deficiency, and said complainant may have execution therefor.

That upon the completion and confirmation of any sale made under and in pursuance of this decree, unless said property shall be redeemed as by law provided, as aforesaid, shall make, execute and deliver to the purchaser or purchasers of said property a good and sufficient deed of conveyance thereof in fee simple, which deed shall specify the property so conveyed and the sum paid therefor, and that said respondent, by its proper corporate officers join in the execution of said deed.

That the respondents, Valentine Laubenheimer, S. W. Holmes and The Cornucopia Mines Company, a corporation, and each, any, and all of them, and all persons claiming by, through or under them, or

cither or any of them be, and they hereby are forever barred and foreclosed from all right or equity of redemption and all claim of, in and to the said mortgaged property, or any part thereof, unless all the amounts adjudged by this decree to be due and payable, are paid in accordance with the provisions of this decree before the time of said sale or shall be redeemed as by law provided; at the time of the execution of said deed the said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said, The Cornucopia Mines Company, a corporation, or any interest therein, vested or standing in the name of the receiver, or to which said receiver has acquired any right, title or interest.

That upon the execution and delivery of the conveyance or conveyances aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into the possession of all of the said mortgaged premises or property so conveyed to him or them, and that any of the parties to this cause, their agents, officers and employees, who may be in possession of the said mortgaged premises or property, or any part of the same, and any person, who has since the commencement of this suit come into the possession of the same, or any part thereof, shall forthwith surrender possession thereof, to such purchaser or purchasers, his or their representatives or assigns.

That said Ed. Rand, Master in Chancery, as aforesaid, make report of his acts and doings under

this decree, with all convenient promptness, after said sale shall have taken place.

Dated this 30th day of April, A. D. 1912.

R. S. BEAN,
Judge.

Filed April 30th, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 5th day of July, 1912, there was duly filed in said Court, and cause, the Report of Sale by the Special Master, in words and figures as follows, to-wit:

Report of Sale.

Pursuant to the order duly appointing me, the undersigned, a Special Master in Chancery, to make sale of the properties of the respondent, The Cornucopia Mines Company of Oregon, which order is filed and recorded herein and to which reference is hereby made, I, as such Special Master, hereby report as follows:

TO THE HONORABLE THE JUDGES OF THE
DISTRICT COURT OF THE UNITED
STATES, FOR THE DISTRICT OF ORE-
GON.

I, the undersigned, as Special Master, herein, by virtue of the decree of the said District Court of

the United States for the District of Oregon, made and entered in this cause on the 30th day of April, 1912, decreeing a foreclosure of the mortgage against the respondent, The Cornucopia Mines Company, to which decree special reference is hereby made for the particular terms and conditions thereof; and pursuant to the order aforesaid of this Court, duly entered in this cause, appointing me as Special Master to make such foreclosure-sale and report thereon, I caused to be published in the Pine Valley Herald, a weekly newspaper of general circulation published at Halfway, Baker County, Oregon, a notice of Master's Sale of the said properties of the said respondent Cornucopia Mines Company of Oregon, in which notice so printed and published, all of the said properties of the said respondent were fully and particularly described, which notice was published in each and every issue of said paper for the full period of six weeks successively, commencing with the issue of May 9th, 1912, and ending with the issue of June 13th, 1912, in the regular issues and not in any supplement thereof, in and by which notice it was duly advertised that I would sell all of said properties of said Cornucopia Mines Company of Oregon to the highest bidder for cash or for cash and bonds, as an entirety, at public auction, at the City of Baker, County of Baker, State of Oregon, on Saturday, June 29th, 1912, a copy of which notice so published and duly subscribed and verified is hereto attached as a part of this report. And I also caused to be published in the Morning Telegraph, a daily newspaper of general circulation pub-

lished in the City of New York, in the State of New York, a like notice, fully describing all said properties and in like manner, to-wit, for six successive weeks preceding the said date of sale, to-wit: the 29th day of June, 1912, a copy of which notice, duly subscribed and verified, is hereto attached as a part of this report.

That by each of said notices I gave notice that such sale of said properties would be at the door of the Court House in said Baker County, in the said City of Baker, in said County, between nine o'clock in the morning and four o'clock in the afternoon.

Accordingly, at nine o'clock in the morning of June 29th, 1912, at the door of the Court House of said Baker County, in said City of Baker, I publicly published and declared that the said properties would be foreclosed and sold at eleven o'clock A. M. of the same day and at the same place.

Pursuant to the said public declaration and the said published notice and decree of this Court duly made in this cause, I offered the said properties described in said notice and said decree for sale to the highest bidder, as an entirety, and for cash, or cash and bonds.

Thereupon, C. E. S. Wood, of Portland, Oregon, as trustee for the bondholders, bid the sum of Four Hundred and Thirty-two Thousand (\$432,000) Dollars. There was no other bid and after publicly crying the property and inviting bids, there being no other bids, I struck down and sold the said properties and the whole thereof to the said C. E. S. Wood, Trustee,

for the sum of Four Hundred and Thirty-two Thousand (\$432,000) Dollars.

The said C. E. S. Wood, Trustee, then and there rendered to me in payment of his said bid six hundred (60) first mortgage bonds of the respondent, The Cornucopia Mines Company of Oregon, numbered from one (1) to six hundred (600), and of the par value of five hundred (\$500) dollars each, or the total principal sum of Three Hundred Thousand (\$300,000) Dollars, each bond bearing interest at the rate of 6% per annum and carrying accrued and unpaid interest in the total sum of one hundred and thirty-six thousand (\$136,000) dollars. And I then and there accepted said bonds with the said accrued interest, in full payment and satisfaction of the bid of the said C. E. S. Wood, Trustee, and then and there declared to him that I had sold to him as trustee and would convey to him as such trustee, or to his assigns, the following described properties, together with all appurtenances thereunto belonging, and all the properties whatsoever, real or personal, of The Cornucopia Mines Company of Oregon, whether specifically described in the following schedule or not.

(Description of property sold by Master herein, see pages of Complainant's Bill, where property sold is fully described.)

I further report, that I have delivered to said C. E. S. Wood, Trustee, a copy of this report, duly signed by me, as a certificate of sale, and that I hold said bonds to be returned into the registry of this

Court, or otherwise, as the Court may direct, to be cancelled, and as so cancelled to be re-delivered to the respondent, The Cornucopia Mines Company of Oregon, as the purchase price paid by the purchaser, C. E. S. Wood, Trustee, for the said properties, and as liquidation of the indebtedness of said The Cornucopia Mines Company of Oregon.

All of which is respectfully submitted.

ED. RAND,
Special Master of Chancery.

*In the District Court of the United States for the
District of Oregon.*

(IN EQUITY.)

**Notice of Master's Sale Under Decree of Fore-
closure.**

WHEREAS at the term of the District Court of the United States for the District of Oregon held at the City of Portland, in the State of Oregon on the 30th day of April, 1912, a decree was entered in the above entitled suit foreclosing the mortgage against said respondent, The Cornucopia Mines Company, mentioned and described in said complaint from the complainant; and

WHEREAS, IT IS THEREIN ORDERED, ADJUDGED AND DECREED that all of the corporate property now owned or hereafter to be acquired by said The Cornucopia Mines Company within the State of Oregon or elsewhere; shall be

sold at public sale, that is to say, a public sale shall be made of all and singular the water rights, flumes, electric plant, mines, mining claims, equipment and all other property then held or acquired or thereafter held or acquired, and also all the easements, property, leasehold rights, and things of whatsoever name or nature then owned by The Cornucopia Mines Company, a corporation, or which might be thereafter acquired by it, the said property then in existence being specifically described in said mortgage or deed of trust as follows:

For description of the property described in this Notice, see Bill of Complaint, pages to

WHEREAS, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Special Master in Chancery appointed therefor shall sell said property for cash, or for cash and bonds, and as an entirety, at public auction to the highest bidder therefor at the City of Baker, in the County of Baker and State of Oregon; and

WHEREAS, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that notice of the time and place of sale shall be given by said Special Master by advertising the same by publication thereof once each week for six successive weeks preceeding the date of sale in the Pine Valley Herald, a weekly newspaper of general circulation in said Baker County, and said notice shall also be published at least once a week for six successive weeks in at least one daily newspaper of general circulation, published in the City of New York in the State of

New York; and that such sale shall be had between 9 o'clock in the morning and 4 o'clock in the afternoon, at the door of the Court House of said Baker County, in the City of Baker in said County.

NOW, THEREFORE, public notice is hereby given that I, Ed. Rand, Special Master, in pursuance of the provisions of the said decree, will, on Saturday, the 29th day of June, A. D. 1912, at the hour and place hereinbefore stated, sell at public auction to the highest bidder in accordance with the terms and conditions of said decree, the above described property, lands and premises, and will apply the proceeds thereof as by said decree made and provided.

ED. RAND,
Special Master, District Court of United
States, District of Oregon.

Affidavit of Publication.

State of Oregon,
County of Baker.—ss.

I, Wm. L. Flower, being first duly sworn, depose and say, that I am foreman of the PINE VALLEY HERALD, a weekly newspaper of general circulation published at Halfway, Baker County, Oregon, and that the hereunto attached Notice of Master's Sale was published in each and every issue of said paper for the full period of six weeks or six successive issues thereof, commencing with the issue of

May 9th, 1912, and ending with the issue of June 13th, 1912, and not in any supplement thereof.

WM. L. FLOWER.

Subscribed and sworn to before me this 15th day of June, 1912.

(Seal) W. J. DOUGLAS,
Notary Public of Oregon.

State of New York,
City and County of New York.—ss.

E. C. Clark, being duly sworn, says that he is the principal clerk of the Publisher of The Morning Telegraph, a daily newspaper, printed and published in the City and County of New York, that the advertisement hereto annexed has been regularly published in the said The Morning Telegraph, once a week for six successive weeks, beginning on the 16th day of May, 1912, and also on the 26th day of June, 1912.

E. C. CLARK.

Sworn to before me, this 26th day of June, 1912.

(Seal) JOHN J. NELL, Jr.,
Notary Public for New York County.

Master's Report of Sale:
Filed July 5th, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 6th day of August, 1912, there was duly filed in said Court, and cause, a Motion for Confirmation of sale, in words and figures as follows, to-wit:

Motion to Confirm Sale.

Now comes Hamilton Trust Co., the complainants herein, by C. E. S. Wood, its attorney, and shows to the Court that heretofore, June 29th, 1912, pursuant to the order of this Court, Ed. Rand, Special Master in Chancery, regularly and duly sold all of the properties of the Respondent Cornucopia Mines Company to C. E. S. Wood, Trustee, the highest bidder, for the sum of four hundred and thirty-two thousand (\$432,000) dollars, and received payment in the first mortgage bonds of the Respondent and said Special Master has made due return and report of all his doings in the premises, which report was filed herein July 5th, 1912. And no objections of any kind have been filed to said report. And the said Complainant herein Hamilton Trust Company moves the Court that the said sale to C. E. S. Wood be confirmed.

C. E. S. WOOD,
of Attorneys for Complainant,
Hamilton Trust Company.

Filed August 6th, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Tuesday, the 6th day of August, 1912, the same being the 31st Judicial day of the regular July, 1912, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Confirming Sale.

On motion of Mr. C. E. S. Wood, attorney for the complainant, Hamilton Trust Company, that the sale of all the properties of the respondent, to C. E. S. Wood, trustee, for the sum of Four Hundred and Thirty-two Thousand Dollars, be confirmed. And it appearing that Ed. Rand, Special Master in Chancery, duly appointed to make sale of the properties designated and described in the bill of foreclosure, did on the 29th day of June, 1912, pursuant to the order of this Court, make sale of such properties specially described to C. E. S. Wood, trustee, for the sum of Four Hundred and Thirty-two Thousand dollars, and on July 5th, 1912, filed his report in the premises and that since the filing of his said report, the full time required by the rule of Court in the premises has elapsed, and no objection of any kind has been filed, and no one has appeared to object to said report or any part thereof. It is hereby ordered that the said sale of all the properties of The Cornucopia Mines Company and all of the said properties specially described in the bill of complaint and in the order of sale and in said Master's Report to C. E. S. Wood, trustee, for the sum of Four Hundred and Thirty-two Thousand (\$432,000) Dollars be and

hereby is confirmed in every respect, and the surrender of C. E. S. Wood, trustee, to said Ed. Rand, Special Master in Chancery, of six hundred of the first mortgage bonds of the said Cornucopia Mines Company, respondent, with unpaid accrued interest thereon in the sum of one hundred and thirty-six thousand (\$136,000) dollars, and the acceptance by said Rand of said bonds and interest as full payment of the said bid by C. E. S. Wood, trustee, is hereby approved and that as against the respondent Cornucopia Mines Company, the said C. E. S. Wood, trustee, ought to be and hereby is credited with any overplus between the amount of said bid and the value of the bonds and accrued interest surrendered, if upon any future showing such credit between said respective parties become material, and it is further ordered that if no redemption of said properties or any of them be had or other proceeding in the nature of a stay, the said Special Master Ed. Rand shall, on the expiration of the redemption period, to-wit, sixty days from this date, convey to said C. E. S. Wood, trustee, by the usual Master's deed in due form all of the properties of the Cornucopia Mines Company, respondent herein, especially those properties specifically described, the sale of which to C. E. S. Wood, trustee, is hereby confirmed as aforesaid, and which are hereby declared to be Mining Properties as follows, to-wit:

(Description of property sold by Master herein. see pagesof Complainant's Bill, where property sold is fully described.)

R. S. BEAN,
United States District Judge.

Filed August 6th, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 30th day of August, 1912, there was duly filed in said Court, and cause, Final Report of Receiver, in words and figures as follows, to-wit:

Final Report of Receiver.

To the Honorable Judges of the District Court of the United States for the District of Oregon:

Robert M. Betts, respectfully submits his report as Lessee and Receiver herein:

1. That said Robert M. Betts was heretofore by an order of this Court duly appointed the receiver of The Cornucopia Mines Company of Oregon, a corporation, in the suit of the above named complainant in a mortgage foreclosure proceeding in this Court.

2. That thereafter he duly qualified as such receiver in the above named suit and proceeding.

3. That during the said receivership of said Cornucopia Mines Company of Oregon as aforesaid he held and operated said Mines under a written

lease with said Cornucopia Mines Company from the first day of November, 1911, until the first day of November, 1912.

That he hereby submits this his final report of the operation of said mines under said lease and receivership to this Court, said account showing that he received \$71,681.27 as receipts from ores, bullion and concentrates in the operation of said mines of said respondent; that said account shows his total expenditures in the conduct and operation of said mines, stamp mill, etc., in the sum of \$71,681.27, less a deficit of \$781.81. That he took proper signed vouchers for each and every item of account as set forth in the account attached hereto and made a part of this final report.

5. That he examined each and every voucher and account of such expenditure, as shown by the vouchers, and finds the same correct and true.

6. That all the property of every kind and character real and personal, and all assets of The Cornucopia Mines Company of Oregon, respondent, were sold under a decree and order of this Court on the 29th day of June, 1912, by Ed. Rand, the Special Master of the District Court of the United States for the District of Oregon, who was theretofore appointed by this Court as such special master, and before said sale as aforesaid he duly qualified as such special master; that at such master's sale as aforesaid, said property real and personal was sold to C. E. S. Wood, as trustee, by Ed. Rand, as Special Master

of this Court, and said sale was afterwards by this Court duly confirmed.

7. That there is no other property real or personal of said Cornucopia Mines Company of Oregon, respondent, unsold or remaining to be administered upon by said receiver.

Wherefore, said Robert M. Betts, as such receiver, prays this Court to approve said final accounting and settle same; that upon the settlement of said account that said receiver be discharged as such receiver, and his bond exonerated.

Respectfully submitted,

ROBERT M. BETTS.

The Cornucopia Mines Co. of Oregon.

Receipts and expenditures accrued prior to appointment or Receiver, January 1st, 1912:

Expenditures.		Receipts.
Voucher No.		
525.....\$	22.00	From Lessee Act.....\$ 1,224.19
526.....	687.50	Bal. Conc. Lot 103..... 2,795.59
527.....	1.57	
528.....	10.50	
529.....	14.14	
530.....	59.00	
532.....	14.04	
534.....	7.08	
535.....	9.68	
550.....	484.35	

536.....	31.20
538.....	100.00
539.....	20.00
540.....	132.47
542.....	10.80
543.....	79.25
545.....	188.60
546.....	217.19
547.....	664.70
549.....	8.48
551.....	152.01
552.....	4,065.45

\$ 6,980.01

\$ 4,019.78

Receipts and expenditures for the month of January, 1912.

Expenditures.**Receipts.**

Voucher No.

553.....	\$ 7.50	Bullion.....	\$ 1,561.28
554.....	1,409.75	Concentrate.....	1,500.00
555.....	62.70	Bullion.....	1,357.40
556.....	105.15	do	1,599.00
557.....	350.00	Concentrate.....	2,869.71
558.....	10.00	Bullion.....	1,371.57
559.....	250.00	Leesee Act	4.00
560.....	13.75	Voucher 571.....	1,150.00
561.....	488.37	do 559.....	250.00
562.....	100.00		
563.....	513.75		
564.....	17.30		

566.....	50.00
567.....	3.99
568.....	100.16
569.....	97.38
570.....	13.70
571.....	1,150.00
572.....	31.40
573.....	33.26
574.....	122.50
575.....	225.00
576.....	211.32
577.....	4.40
578.....	131.36
579.....	34.33
581.....	119.70
582.....	21.45
583.....	4,015.70

\$ 9,693.92

\$11,662.96

Receipts and expenditures for the month of February, 1912.

Expenditures.

Receipts.

Voucher No.

584.....\$	246.50	Bullion.....	\$ 1,438.61
586.....	2.55	Concentrate.....	4,519.97
587.....	87.80	C. Trad. Co.....	3.67
588.....	350.00		
589.....	78.50		
590.....	720.98		
591.....	18.55		
592.....	100.00		

593.....	1.50
594.....	48.20
595.....	5.15
596.....	30.33
597.....	2.30
598.....	77.43
599.....	14.00
600.....	25.91
601.....	641.27
602.....	123.58
603.....	685.35
604.....	284.79
605.....	250.00
607.....	200.85
608.....	3.15
609.....	140.00
610.....	150.00
611.....	153.76
612.....	27.00
613.....	416.98
614.....	343.75
617.....	73.55
618.....	250.00
619.....	21.50
620.....	3,807.35

\$ 9,382.58

\$ 5 962 25

Receipts and expenditures for the month of March, 1912.

Expenditures.		Receipts.	
Voucher No.			
621.....	\$ 76.00	Bullion.....	\$ 1,545.16
622.....	155.68	Concentrate.....	300.00
623.....	847.30	Bullion.....	1,334.51
624.....	2.80	Concentrate.....	1,000.00
625.....	116.00	do	3,882.33
626.....	350.00	do	4,000.00
628.....	100.00	Bullion.....	1,359.47
629.....	621.68		
630.....	3.00		
631.....	319.48		
632.....	32.00		
633.....	15.07		
634.....	375.61		
635.....	159.57		
636.....	1,152.93		
637.....	7.25		
638.....	107.25		
640.....	1,332.68		
641.....	46.43		
642.....	2.80		
643.....	500.00		
644.....	3,600.75		
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\$ 9,924.28		\$13,421.47	

Receipts and expenditures for the month of April,
1912.

Expenditures.**Receipts.**

Voucher No.

645.....\$	27.00	Bullion.....	\$ 1,405.82
646.....	2.45	Concentrate.....	300.00
647.....	14.00	Bullion.....	1,466.95
648.....	75.24	C. Trad. Co.....	59.80
649.....	1.65	Standard O.	2.10
650.....	62.70	Bullion.....	1,381.49
651.....	27.00	Concentrate.....	861.89
652.....	708.55		
653.....	350.00		
654.....	100.00		
655.....	843.80		
657.....	75.10		
658.....	139.50		
659.....	215.66		
660.....	7.60		
661.....	32.37		
663.....	37.52		
664.....	23.81		
665.....	35.52		
667.....	100.04		
668.....	105.04		
669.....	93.64		
670.....	4,467.70		

\$ 7,545.89

\$ 5,478.05

Receipts and expenditures for the month of May,
1912.

Expenditures.

Receipts.

Voucher No.

672.....\$	616.11	Bullion.....\$	1,199.45
673.....	34.54	do	1,091.27
674.....	89.43	Concentrate.....	300.00
675.....	60.50	Bullion.....	1,669.94
676.....	381.75	Concentrate.....	4,377.56
677.....	874.30	S. & F. Ford.....	1.15
678.....	100.00	Coffinberry	36.95
679.....	766.40	Witten	33.00
680.....	325.00		
681.....	13.00		
682.....	18.00		
683.....	50.00		
684.....	50.00		
685.....	50.00		
686.....	41.85		
687.....	74.63		
688.....	16.95		
689.....	108.35		
690.....	15.75		
691.....	246.00		
692.....	1,523.27		
693.....	113.52		
694.....	115.00		
695.....	177.00		
696.....	3.63		
697.....	350.00		
698.....	31.80		

699.....	235.00
700.....	257.16
701.....	2.90
702.....	372.23
703.....	178.87
704.....	247.64
705.....	4.48
706.....	5,043.60

\$12,588.66

\$ 8,709.32

Receipts and expenditures for the month of June,
1912.

Expenditures.**Receipts.**

Voucher No.

708.....\$	19.60	Buebendorf	\$	49.05
709.....	95.00	Bullion.....		1,363.08
710.....	11.95	do		757.44
711.....	385.00	Concentrate.....		3,970.04
712.....	38.00	do		4,366.51
713.....	684.60	do		300.00
715.....	100.00	C. Trad. Co.....		580.53
716.....	10.34			
717.....	3.35			
719.....	12.78			
720.....	250.00			
723.....	6.78			
724.....	54.75			
728.....	237.77			
731.....	276.46			
732.....	61.70			
734.....	30.13			

736.....	14.55
737.....	950.33
740.....	4,569.10

\$ 7,812.19

\$11,386.65

Receipts and expenditures for the month of July,
1912.

Expenditures.

Receipts.

Voucher No.

743.....\$	100.00	Ross	\$	25.75
744.....	75.00	Concentrate.....		100.00
745.....	55.20	do		3,500.00
746.....	11.75	do		455.15
747.....	20.00	do		1,000.00
748.....	100.00	do		3,078.08
749.....	3.25	R. M. Betts.....		2,100.00
754.....	22.00			
755.....	83.80			
756.....	138.03			
757.....	50.53			
758.....	61.20			
759.....	3.18			
761.....	25.39			
762.....	58.00			
763.....	11.61			
764.....	644.69			
765.....	95.34			
766.....	14.40			
767.....	300.00			
769.....	2.75			
770.....	77.60			

771.....	195.18
772.....	286.16
773.....	877.01
777.....	5.00
778.....	12.00
779.....	100.00
780.....	71.06
781.....	6.31
782.....	200.00
783.....	13.20
785.....	4,033.10

\$ 7,753.74

\$10,258.98

Recapitulation.

Accrued before the appointment of the Receiver.

	Expenditures.	Receipts.
During Receivership.....	\$ 6,980.01	\$ 4,019.78
January, 1912.....	9,693.92	11,662.96
February, 1912.....	9,382.58	5,962.25
March, 1912.....	9,924.28	13,421.47
April, 1912.....	7,545.89	5,478.05
May, 1912.....	12,588.66	8,709.32
June, 1912.....	7,812.19	11,386.65
July, 1912.....	7,753.74	10,258.98
Cash deficit.....		781.81
	<hr/>	<hr/>
	\$71,681.27	\$71,681.27

Filed August 30, 1912.

A. M. CANNON,
Clerk.

And Afterwards, to-wit, on the 10th day of October, 1912, there was duly filed in said Court, and cause, an Affidavit for Appointment of Guardian ad litem, of John L. Bisher, Jr., in words and figures as follows, to-wit:

Affidavit of John L. Bisher, Jr.

State of Oregon,
County of Multnomah.—ss.

I, John L. Bisher, Jr., being first duly sworn, depose and say that I am the son of John L. Bisher, Sr., and am of the age of eighteen years.

That on or about the 28th day of July, 1912, I was working for Robert M. Betts, as receiver of the Cornucopia Mines Company of Oregon, and while so employed, I received personal injuries which I contend were caused by the negligence of said receiver, and I deem it necessary to institute legal proceedings for the recovery of damages sustained thereby.

I have no regular guardian and desire that my father, John L. Bisher, be appointed guardian ad litem to institute legal proceedings in my behalf to recover damages from Robert M. Betts, as receiver for the Cornucopia Mines Company of Oregon.

JOHN L. BISHER, JR.

Subscribed and sworn to before me this 10th day of October, 1912.

(Seal)

J. F. BOOTHE,

Notary Public for Oregon.

Filed October 10th, 1912.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on Thursday, the 10th day of October, 1912, the same being the 87th Judicial day of the regular July, 1912, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Appointing Guardian Ad Litem.

Now, at this time, upon the application of John L. Bisher for an order appointing a guardian ad litem for the purpose of instituting legal proceedings against the above named Robert M. Betts, as receiver of the Cornucopia Mines Company of Oregon.

It appearing to the Court from the affidavit of John L. Bisher, Jr., that he was in the employ of said receiver, Robert M. Betts, during the month of July, 1912, and that on or about the 28th day of July, 1912, he sustained personal injuries wherein he claims that said injuries were caused by the negligence of said Robert M. Betts as receiver of The Cornucopia Mines Company of Oregon.

And it further appearing to the Court that said John L. Bisher, Jr., has not heretofore had a legal guardian appointed for him.

And it further appearing to the Court that John L. Bisher, Sr., is the father of said John L. Bisher, Jr., having his legal custody.

IT IS HEREBY ORDERED that said John L. Bisher, Sr., be and he is hereby appointed guardian

of said John L. Bisher, Jr., for the purpose of instituting and carrying on legal proceedings against Robert M. Betts as receiver of The Cornucopia Mines Company of Oregon, and said corporation, for the recovery of damages alleged to have been sustained by said John L. Bisher, Jr., while in the employ of said Robert M. Betts, as receiver of said corporation.

R. S. BEAN,
Judge.

Filed October 10th, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 13th day of May, 1913, there was duly filed in said Court, and cause, a Motion for Leave to Intervene, in words and figures as follows, to-wit:

Motion for Leave to Intervene.

Now, at this time comes John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, and moves the Court for an order permitting him to file his petition of intervention in the above entitled cause as a lien creditor, and herewith presents his petition, duly verified, setting forth his reasons for intervention, and asks the Court to be permitted to file said petition and that the Court fix a time for a hearing by the complainant and respondents to

show cause, if any, why the prayer of said intervenor should not be granted.

BOOTHE & RICHARDSON,
Attorneys for Intervener.

Filed May 13th, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Tuesday, the 13th day of May, 1913, the same being the 62nd Judicial day of the regular March, 1913, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order to Show Cause on Petition for Leave to Intervene.

Upon reading and filing the petition of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, praying to be let in as a party in this suit, as a lien creditor.

IT IS ORDERED that the complainant and respondents herein show cause on the 28th day of May, 1913, at the opening of Court, or as soon thereafter as counsel can be heard, why the prayer of said intervenor should not be granted.

IT IS FURTHER ORDERED that copies of this order and said petition be forthwith served

upon the attorneys for the complainant and respondents respectively.

(S) CHAS. E. WOLVERTON,

Judge.

Filed May 13th, 1913.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 14th day of May, 1913, there was duly filed in said Court, and cause, a Petition of John L. Bisher, Jr., in Intervention, in words and figures as follows, to-wit:

Petition of John L. Bisher, Jr.

To the Honorable Judge of the District Court of the United States, for the District of Oregon:

Now comes John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, hereinafter styled the intervener, and with leave of the Court first had and obtained, files this, his petition in intervention, in the above entitled cause, and respectfully represents and shows to the Court as follows:

I.

That the intervener is a citizen of Baker County, State of Oregon.

II.

That on or about the 12th day of October, 1912, the intervener, upon leave of the Court, duly instituted his certain action against Robert M. Betts,

but a sufficient portion of the the purchase price should be paid in cash to provide funds for payment of all costs and expenses incurred therein, and that the Master return the cash proceeds of said sale to the Clerk of this Court, and that the same be paid to the Clerk of this Court, and upon the completion and confirmation by this Court of the sale made under and in pursuance of said decree, the said Clerk of this Court should pay out such moneys as follows:

- (1) The expenses of the sale of said property.
- (2) The expenses of the receivership herein.
- (3) The costs of said suit.
- (4) The complainant's attorneys' fees.
- (5) The taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.
- (6) All amounts due or to become due upon the bonds secured by said mortgage, and in case such proceeds shall be insufficient to pay in full the amount of principal and interest so due and unpaid on such bonds, then the proceeds should be applied ratably upon the whole amount due according to the aggregate thereof, without preferance or priority of any part over any other part thereof.
- (7) The remainder, if any, to The Cornucopia Mines Company of Oregon.

VI.

Thereafter and on the 5th day of July, 1912, said Special Master filed herein his report of said sale, showing that in accordance with the order of this

Court, and in accordance with the decree and order of sale, he sold to C. E. S. Wood, as trustee for the bondholders, the complainant herein, the entire property mentioned and described in said decree for the sum of Four Hundred and Thirty-two Thousand (\$432,000.00) Dollars, and that he accepted said bonds with accrued interest thereon in full payment and satisfaction of the bid of said C. E. S. Wood, trustee, as aforesaid, and then and there declared that he had sold to him as trustee, and would convey to him as such trustee, or to his assigns, the properties so sold by him, a particular description of which properties it is unnecessary to mention in this petition, but the intervener refers to the said Master's report in this proceeding for a description of the properties so sold and to be conveyed.

VII.

That on the 6th day of August, 1912, on the application of the complainant herein, said sale was confirmed by this Court.

VIII.

That thereafter and on the 30th day of August, 1912, the said Robert M. Betts, as receiver, filed herein his final report and account as such receiver, and asked that the same be approved.

IX.

That thereafter and on the 20th day of November, 1912, after said sale had been confirmed, the

said Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, executed a deed of conveyance in favor of The Cornucopia Mines Company of New York, a corporation of New York, of all the properties described in the complaint, together with certain other properties belonging to the said Cornucopia Mines Company of Oregon and in the hands of said Robert M. Betts as receiver of said corporation, as follows:

Water right and appropriation numbered application No. 2056, to the State of Oregon, through its State Engineer John H. Lewis, and permit No. 1060 to appropriate the public waters of the State of Oregon;

Said water appropriation is taken out of Pine Creek, near the town of Cornucopia, Baker County, Oregon, for the purpose of generating electric power for operating the stamp mills, machinery and other works and lighting the Cornucopia mines at or near the town of Cornucopia, Baker County, Oregon. That the point of diversion of said water appropriation is located 38 chains S., 66 degrees 30' west of N. E. corner of Section 3, Tp. 7, S. R. 45 E., Willamette Meridian, being within the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 3, Tp. 7 S., R. 45 E., W. M., in Baker County, Oregon. Said water appropriation is to be taken from said Pine Creek at foregoing described point of appropriation, by an intake into a flume terminating in the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 3, Tp. 7 S., R. 45 E., W. M., in Baker County, Oregon; the name of the ditch or flume is

named Cornucopia Mines Company Flume.

Electric power is to be generated by an electric power plant with pelton wheels, located upon the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7 S., R. 45 E., W. M.

Said water appropriation and water right, after being used for said power purposes, is returned to said described Pine Creek at a point S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Tp. 7 S., R. 45 E., W. M., in Baker County, Oregon.

For a fuller and accurate description of the said water right and appropriation hereby granted and conveyed by this deed, reference is hereby made to Application No. 2056, and Permit No. 1060, in the office of the State Engineer of Oregon, at Salem, Oregon, received by said Engineer for the State of Oregon at his said office on the 3rd day of February, 1912, at 8 A. M., and approved by said John H. Lewis, State Engineer of Oregon, on February 28th, 1912.

X.

The intervener objects to the Master's report of the sale of said property filed herein for the reason that said Master failed to require a sufficient portion of the purchase price to be paid in cash to provide funds for payment of all costs and expenses incurred therein, and the expenses of said receivership, and said sale was not made in compliance with the order of this Court.

XI.

That said receiver did not at any time report to

this Court the fact that the intervener had been injured while in the employ of said receiver, and no provision was made before the confirmation of said sale for the payment of the amount that might be found to be due to the intervener on account of his said injuries, which the said receiver at all times knew.

XII.

That said receiver is now attempting to be discharged by an order of this Court without making provision for the payment of the judgment obtained by the intervener against said Robert M. Betts as such receiver, and it would be inequitable to discharge said receiver and thereby destroy the intervener's rights by the discharge of said receiver.

XIII.

The intervener further objects to the final account of said receiver for the following reasons:

He objects to the following disbursements by the receiver for the reason that said receiver never obtained an order of the Court for such disbursements, and that they were unnecessary expenses incurred for the purpose of preserving and operating said property:

Voucher No. 538—Emmett Callahan, legal	
services for December,	
1911	100.00
” No. 581—H. B. Thomas, for	
transformers	119.70

Voucher No. 575—McKim & Co., 1 hoist.....\$	225.00
” No. 571—Hawkins & Smith, for sawing timber	1,575.00
” No. 569—General Electric Co., for electric supplies.....	97.38
” No. 568—General Electric Co., fuses and wire.....	100.16
” No. 562—Emmett Callahan, legal expense for Jan., 1912..	100.00
” No. 561—Carlson Lusk Hdw. Co., rails, plates and bolts.....	488.37
” No. 559—N. B. Booley, hauling lumber	250.00
” No. 557—Robert M. Betts, salary for January, 1912.....	350.00
” No. 555—Basche Sage Hdw. Co., freight	62.70
” No. 554—Basche Sage Hdw. Co., 150 bbls. cement.....	472.50
” No. 617—Union Iron Works, plates, brushes, etc.....	73.55
” No. 614—S. & F. Ford Co., for warding	343.75
” No. 613—S. & F. Ford Co., cya- nide plant and machin- ery supplies.....	416.98
” No. 609—Walter L. Reid, cyanide plant and other expenses	140.00
” No. 605—Alex. McDonald, pur- chase 5 acres for power site	250.00

Voucher No. 598—Galigher Machinery Co., machine parts.....	\$ 77.43
” No. 597—John W. Graham & Co., 2 rolls blue print paper...	2.30
” No. 595—W. & L. E. Curley, tan- gent screw.....	5.15
” No. 592—Emmett Callahan, legal services for February, 1912	100.00
” No. 588—Robert M. Betts, salary for February, 1912.....	350.00
” No. 584—Basche Sage Hdw. Co., 150 bbls, cement, steel plates	246.50
” No. 589—Crown Steel Works.....	78.50
” No. 640—S. & F. Ford Co., better- ment of machinery, cya- nide plant, power re- pairs, etc.....	1,332.68
” No. 631—General Electric Co., for machinery, etc.....	319.48
” No. 628—Emmett Callahan, legal expense for March, 1912	100.00
” No. 626—Robert M. Betts, salary for March, 1912.....	350.00
” No. 622—Blue Mountain Iron Works, dies and bucket...	155.68
” No. 650—Basche Sage Hdw. Co., cyanide plant.....	62.70
” No. 653—Robert M. Betts, salary for April, 1912.....	350.00

Voucher No. 651—Emmett Callahan, legal services for April, 1912...	\$ 100.00
" No. 657—Crane & Co.....	75.10
" No. 658—Denver Rock Drill & Mach. Co., mine repairs	139.50
" No. 659—Galigher Machinery Co., mining supplies.....	215.66
" No. 672—Tuffili Bros., pig iron and coke, carload of coal	616.11
" No. 676—Robert M. Betts, salary and other expenses.....	381.75
" No. 678—Emmett Callahan, legal services for May, 1912...	100.00
" No. 680—John Curry, horses.....	325.00
" No. 685—First National Bank, 20,000 saw timber.....	50.00
" No. 684—First National Bank, 20,000 saw timber.....	50.00
" No. 683—First National Bank, advertising timber sale.....	50.00
" No. 687—General Electric Co., pulley, brushes and fuse	74.63
" No. 691—E. P. Jamison & Co., drills, etc.....	246.00
" No. 692—Luce & Roseborough, betterments to machinery and cyanide plant.....	1,523.27
" No. 694—McKim & Co., ore bucket and cars.....	115.00
" No. 695—Mine & Smelter Supply Co., 6 car trucks.....	177.00

Voucher No. 709—American State Bank, timber	\$ 95.00
” No. 711—Robert M. Betts, salary and traveling expenses.....	455.00
” No. 713—Basche Sage Hdw. Co., powder	684.60
” No. 715—Emmett Callahan, legal expense	100.00
” No. 720—Hawkins & Smith, lum- ber	250.00
” No. 740—Pay roll— Cyanide plant.....	750.00
Repairs	407.80
Power labor	305.75
New power plant.....	82.50
” No. 748—Emmett Callahan, legal expense	100.00
” No. 747—C. C. Betts Co., better- ments to buildings.....	20.00
” No. 745—Robert M. Betts, salary and legal expense.....	384.00
” No. 744—American State Bank, timber	75.00
” No. 743—American State Bank, timber	100.00
” No. 754—Denver Rock Drill & Machinery Co., cylinder nuts and valves.....	22.00
” No. 757—General Electric Co., betterments to cyanide plant, etc.....	66.13

Voucher No. 756—General Electric Co., tubes, sockets and lamps.	\$ 138.03
" No. 758—Caligher Machinery Co., screen rods, dies, etc.....	83.35
" No. 763—Hughes & Co., boiler and stand	11.61
" No. 765—International High Speed Steel Co., betterments.....	95.34
" No. 767—Alex. McDonald, 5 acres of ground and right of way	300.00
" No. 779—Cloma Sanders, mine timbers	100.00

The intervener excepts to the report and account of said receiver for the further reasons: That it appears therefrom that the receiver disbursed, as shown by vouchers Nos. 525 to 552 inclusive, various sums of money, aggregating \$6,980.01, in payment of claims against said Mining Company prior to the appointment of said receiver, as against which disbursements said receiver accounts for moneys received from lessee and otherwise aggregating only \$4,019.78, showing a disbursement of \$2,160.23, without and authority from the Court and without authority as receiver. The said Robert M. Betts, when appointed as receiver by this Court, was authorized and directed to take immediate possession of all and singular the real and personal property covered by the mortgage sought to be foreclosed by the complainant herein, and to continue the operation of said mining and other property,

and every part thereof, as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so; that out of the moneys that should come into the hands of said receiver from the operation of said property or otherwise, he should pay the necessary expenses incident to the operation of said property and hold the remainder, if any, subject to the order of this Court, and said appointment was made on condition that said Robert M. Betts should not receive any compensation for his services as such receiver from any of the parties herein, and that he obey the orders of the Court as made from time to time.

The intervener states that said receiver has not complied with the order of the Court in his appointment in many respects: He has disbursed and paid to himself, without authority of the Court, \$350.00 a month as salary during the most of the time he has been acting as receiver, as will appear by his vouchers filed herein, besides disbursing a large amount of money for attorney's fees and has expended large sums of money in constructing a new cyanide plant and in making other improvements and betterments to said property, all of which disbursements were unnecessary to preserve the property in condition and keep the same in repair, and were unnecessarily expended for betterments of said property in disregard of the rights of this intervener.

XIV.

That the accounts of said receiver should be opened up and examined, and if the same were opened up and examined, it would be apparent to the Court that the receiver should have on hand a large amount of money that should be applied to the payment of the intervener's claim on account of his said judgment against the receiver; and it will further appear to the Court that the said receiver has, since the foreclosure of the mortgage herein and since the intervener commenced his action to recover damages, sold and transferred unto The Cornucopia Mines Company, a corporation of New York, the water rights and properties hereinbefore set forth, which properties were not included in the complainant's mortgage, but were acquired during the time the said Robert M. Betts was acting as receiver of said corporation, and at a time while this intervener was entitled to have the same held liable for the payment of the necessary expenses of the receivership, including the intervener's claim. The intervener is informed and believes that The Cornucopia Mines Company, a corporation, of New York, is merely a reorganization of a corporation taking over the properties sold by virtue of the foreclosure proceedings herein, and that the complainant, being the mortgagee and holder of the bonds, is the owner of all the property so acquired under foreclosure, but carried only in another name, to-wit: The Cornucopia Mines Company, a corporation, of New York.

XV.

The intervener further states that in the sale of the property described in the mortgage herein, the Master in Chancery did not follow the decree of the Court by requiring that in making payment of the purchase price, a sufficient portion of the purchase price should be paid in cash to provide funds for the payment of the expenses of the receivership herein, the claim of the intervener being a part of the expenses of said receivership, and that the Master's return did not contain any such cash proceeds as provided by said decree, and no money was paid by him to the Clerk of this Court upon the completion or confirmation of said sale, and said sale should not have been confirmed until such cash payment should have been made to the Clerk of this Court for payment of the receiver's expenses, including the intervener's claim.

XVI.

The intervener objects to the order, confirming the sale made by the Master hereinbefore mentioned, and to the approval of the receiver's final account and to his discharge as receiver for the reasons: That said receiver has never filed with the Clerk of this Court an inventory of the property of the Cornucopia Mines Company of Oregon, or of the property coming into his possession as such receiver. That the intervener never had any notice of the sale by the Master in Chancery of said property or of the confirmation thereof, or of the filing of the final account of said receiver, and has never had an

opportunity of objecting to said confirmation of sale or to said final account; and furthermore, that there has never been a reference to a Commissioner or other person to inquire into and take evidence touching the debt, for the payment of which said property was sold, or the indebtedness incurred by said receiver, or of the receipts and disbursements made by him. And as a further reason for vacating the order of the confirmation of said sale and for a resale of said property, the intervener avers that the said receiver was appointed at the instance and for the benefit of the complainant herein, and said receiver was charged with the duty of operating the property for the advantage of the complainant and, therefore, all charges, expenses and liabilities incurred incident to the receivership, including the intervener's claim, are a first charge, not only upon the current earnings but also upon the corpus of the estate.

WHEREFORE, the intervener prays that said Robert M. Betts be not discharged as receiver in this cause, and that he appear before the Court and show cause, if any, why his said final account should not be disallowed and set aside; and further, that the order confirming the sale made by the Master of Chancery of all the properties described in complainant's complaint herein, be also vacated and set aside. That the Court inquire into all the acts and things done by said receiver, and ascertain the amount of money and property in the hands of said receiver, or that should be in his hands, to the end that the same may be applied to the payment of the

intervener's claim, as represented by his judgment, and costs against said receiver, and that all moneys invested by said receiver in said corporation's property as betterments, and invested without orders of the Court, and the entire property belonging to said corporation and in the hands of said receiver, as well as that included in the mortgage of the complainant herein, be subjected to the payment of the intervener's claim, as represented by his said judgment. That if, upon such inquiry, it appears to the Court that there is not sufficient money in the hands of the receiver to pay the intervener's said claim that the Court make an order requiring a re-sale of said property under its said decree for the satisfaction of the same, or a sufficient amount of cash to satisfy all of the receiver's expenses, including intervener's claim of Twelve Thousand, Five Hundred (\$12,500.00) Dollars, and costs.

BOOTHE & RICHARDSON,
Attorneys for Intervener.

State of Oregon,
County of Multnomah.—ss.

I, Wm. P. Richardson, being first duly sworn, depose and say that I am one of the intervener's attorneys, and the foregoing petition is true, as I verily believe. The reason why I verify this petition is because the intervener is not within this County.

WM. P. RICHARDSON.

Subscribed and sworn to before me this 9th day of May, 1913.

J. F. BOOTHE,
(Seal) Notary Public for Oregon.

State of Oregon,
County of Multnomah.—ss.

Due and legal service of the within petition is hereby accepted in Multnomah County, Oregon, this 13th day of May, 1913, by receiving a copy thereof, duly certified to as such by J. F. Boothe, of Attorneys for Intervener.

EMMETT CALLAHAN,
Attorney for Respondent,
WOOD, MONTAGUE & HUNT,
Attorney for Complainant.

Filed May 13th, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 29th day of May, 1913, there was duly filed in said Court, and cause, a Motion to Dismiss Petition in Intervention, in words and figures as follows, to-wit:

Motion to Dismiss Petition in Intervention.

Now comes the respondent (The Cornucopia Mines Company of Oregon), and appearing herein specially for the purpose of this motion, and not otherwise, hereby moves the Court to dismiss the

petition in intervention asked and prayed for by John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, in the prayer of his said alleged petition in intervention filed in the above entitled cause, and to enter judgment of such dismissal with costs on the following grounds:

First. That no summons has been issued or served upon the respondent above named, or return made thereon, that no summons has been served upon respondent as required by the laws of the United States of America, and the State of Oregon, in such cases made and provided. That on the 5th day of December, 1911, a suit in equity was filed to foreclose a mortgage in the sum of Three Hundred and Ninety-nine odd Thousand Dollars, wherein The Hamilton Trust Company was complainant and the Cornucopia Mines Company of Oregon, Valentine Laubenheimer and S. W. Holmes were respondents, that upon said bill in equity as aforesaid and on proper motion and application therefore, a receiver was appointed on the 21st day of December, 1911. That thereafter, on January 21st, 1912, Robert M. Betts, was appointed receiver of said corporation, respondent, in said mortgage foreclosure suit. That thereafter, on the 30th day of April, 1912, a decree order pro confesso was entered in said foreclosure suit as aforesaid; that upon the 30th day of April, 1912, this Court decreed a foreclosure of said mortgage for the sum including costs of over Four Hundred Thousand (\$400,000) Dollars; that thereafter, Ed. Rand was duly appointed

under a regular and valid order of this Court as a master to sell said property according to law, the rules and procedure of this Court. That said master duly advertised by publication in a newspaper designated by this Court, giving notice of sale of said property of respondent under the decree of foreclosure made and entered by this Court. That said master also, under the order of this Court, advertised said property for sale by due and legal notice in a newspaper in the State and City of New York, the first publication of said notice being May 9th, 1912, and the last publication of said notice being June 13th, 1912. That after said publications having been duly made as aforesaid, said Ed. Rand, special master of the District Court of the United States for the District of Oregon, sold all of said property on the 29th day of June, 1912, in front of the court house in Baker City, Baker County, Oregon, wherein the property of said respondent, Cornucopia Mines Company of Oregon was situate, to C. E. S. Wood, as trustee, for the mortgage bond holders, for the sum of Four Hundred and Thirty-Two Thousand (\$432,000) Dollars. That said master, thereafter, so reported said sale and his doings thereunder his appointment as special master of this Court. That thereafter, on the 6th day of August, 1912, said sale, as aforesaid, as made by said master, to C. E. S. Wood, as trustee, for the mortgage bond holders, was duly confirmed by this Court.

Second. That after the period of redemption from execution and mortgage sale of the property

of said respondent, Cornucopia Mines Company, had expired, C. E. S. Wood, as trustee, upon order, designation and request of said mortgage bond holders, complainants, in the suit of The Hamilton Trust Company, a corporation, against The Cornucopia Mines Company of Oregon, et al., conveyed all of said property of The Cornucopia Mines Company of Oregon, purchased by him as trustee, on the 29th day of June, 1912, to a corporation organized under the laws of the State of New York, said corporation now being the owners, the holders and in possession and operating said mining properties and mines.

Third. That upon the 12th day of October, 1912, John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, commenced an action in this Court against Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, for damages in the sum of Fifty Thousand (\$50,000) Dollars for injuries to the plaintiff, John L. Bisher, Jr., alleged to have been received by said Bisher on the 28th day of July, 1912. That said mines and property so sold as aforesaid to C. E. S. Wood, as trustee for the bond holders on the 29th day of June, 1912, was so taken out of the hands and receivership of said Robert M. Betts, as receiver on the 29th day of June, 1912, and said mines were not in the possession of said Robert M. Betts, as receiver, at any time or date after the 28th day of June, 1912, or conducted or operated by him at any time or date subsequent to said 29th day of June, 1912, as receiver. That in the case of John L. Bisher, Jr., by

his guardian ad litem, John L. Bisher v. Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, a judgment was rendered by a jury in this Court in favor of said plaintiff and against said defendant on the 11th day of April, 1913. That a bill of exceptions in said case was duly deposited with the clerk of this Court on the 24th day of May, 1913, in said action. That said Cornucopia Mines Company of Oregon, respondent, and said Hamilton Trust Company, complainant, were not made parties defendant or otherwise, to the said action of John L. Bisher, Jr., by John L. Bisher, his guardian, ad litem, v. Robert M. Betts, receiver. That no summons, process or writ was ever served upon said Cornucopia Mines Company of Oregon, respondent, or Hamilton Trust Company, complainant in said suit of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem.

This motion is made and based and will be heard upon the affidavits on file and upon the files, papers and proceedings, the minutes of this Court and records in the suits and actions in the following causes in action, Hamilton Trust Company v. The Cornucopia Mines Company, et al., and John L. Bisher, Jr., by John L. Bisher, his guardian, ad litem, v. Robert M. Betts, receiver.

EMMETT CALLAHAN,
Attorney for Respondent for this Motion
and not otherwise.

Filed May 29th, 1913.

A. M. CANNON,

Clerk.

District of Oregon,
County of Multnomah.—ss.

Due service of the within motion is hereby accepted in Portland, Multnomah County, Oregon, this 28th day of May, 1913, by receiving a copy thereof, duly certified to as such by Emmett Callahan, attorney for respondent.

BOOTHE & RICHARDSON,
Attorneys for

Filed May 29th, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Thursday, the 29th day of May, 1913, the same being the 76th Judicial day of the regular March, 1913, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Making John L. Bisher, Jr., Defendant.

On reading and filing the petition of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, duly verified, and proof of due service of the notice of this motion, and the complainant, The Hamilton Trust Company, and the respondent, The Cornucopia Mines Company of Oregon, having heretofore filed their motion to dismiss the said petition of intervention, and said motion having been heretofore argued and submitted to the Court, and the Court having fully considered the same, does

HEREBY ORDER that the motion of the complainant, Hamilton Trust Company, and respondent, said The Cornucopia Mines Company of Oregon, to dismiss said petition of intervention be and the same hereby is denied.

IT IS FURTHER ORDERED that said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, be and he hereby is made a party defendant herein as a judgment lien creditor of Robert M. Betts, receiver of the respondent, The Cornucopia Mines Company of Oregon.

IT IS FURTHER ORDERED that Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, appear and show cause, if any, why said judgment heretofore obtained by John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, should not be paid, and that the said Robert M. Betts show cause herein within 20 days from this date why said judgment should not be paid, if any reason exists; and that he also within said time show cause, if any, why the final account of said receiver, as objected to by the intervener, should not be disallowed and set aside, and why the order confirming the sale made by the Master in Chancery of the properties described in the plaintiff's complaint herein should not also be vacated and set aside, and that the complainant herein, The Hamilton Trust Company, and said Robert M. Betts as receiver of The Cornucopia Mines Company of Oregon, show cause, if any, why the judgment obtained by said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, for the

sum of Twelve Thousand Five Hundred (\$12,500) Dollars and costs, should not be made a first lien upon the properties of the said Cornucopia Mines Company of Oregon in the hands of the receiver on the 28th day of July 1912, or upon any other property belonging to said corporation and within the hands of said receiver at said time.

CHARLES E. WOLVERTON,
Judge.

Filed May 29th, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 20th day of June, 1913, there was duly filed in said Court, and cause, an Answer to Order to Show Cause, in words and figures as follows, to-wit:

Answer to Order to Show Cause.

Now comes Emmett Callahan as attorney for The Cornucopia Mines Company of Oregon, and appearing herein specially for the purpose of responding to the order of this Court requiring it to show cause herein why John L. Bisher, Jr., by John L. Bisher, his guardian, plaintiff, in an action in this Court for damages against Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, a corporation, wherein, by said order of this Court, as aforesaid, said Hamilton Trust Company, Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, and Cornucopia Mines Company of

Oregon, are required to show cause why said John L. Bisher Jr., by his guardian, as aforesaid, should not be permitted to intervene as a judgment debtor in the case of The Hamilton Trust Company, complainant, v. The Cornucopia Mines Company of Oregon, Valentine Laubenheimer and S. W. Holmes, respondents, and to show cause why the sale and confirmation of sale of the property of The Cornucopia Mines Company of Oregon, which was sold under a regular judgment and decree of this Court in the case of The Hamilton Trust Company v. The Cornucopia Mines Company et al, respondents, and why that certain judgment recovered by John L. Bisher, Jr., by his guardian, against Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, which said action is filed and pending in this Court, and not otherwise, and shall not be vacated and set aside, and said Hamilton Trust Company, complainant, Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, and Cornucopia Mines Company of Oregon, respectfully advises and presents to this Court the following statement of facts:

First. That said Hamilton Trust Company, complainant, and Cornucopia Mines Company, respondent, in the foregoing action was not made a party defendant or otherwise by any process of this Court in the action of John L. Bisher, Jr., by his said guardian, in his said action pending in this Court against Robert M. Betts, receiver of Cornucopia Mines Company of Oregon.

Second. That on the 5th day of December, 1911, The Hamilton Trust Company, complainant, vs. Cornucopia Mines Company et al, respondents, filed it's bill of complaint in this Court, praying for judgment and decree in foreclosure against the property of the Cornucopia Mines Company of Oregon, that subpoena and process of this Court was duly issued on the 7th day of December, 1911, according to law and the procedure of this Court; that thereupon said 7th day of December, 1911, a motion and application for a receiver was filed in this Court in said action of foreclosure, that said bill of complaint, subpoenas, motion and application for receiver as aforesaid, is hereby made a part hereof and marked Exhibit "A."

Third. That thereafter, Robert M. Betts was appointed receiver of the property of The Cornucopia Mines Company of Oregon by this Court in said foregoing named action and said order as aforesaid, appointing said receiver, is made a part hereof and marked Exhibit "B."

Fourth. That on the 23rd day of December, 1913, all of the respondents in the aforementioned cause were duly served with subpoena and process of this Court as required by law and the procedure of this Court; which said process and subpoenas are hereby referred to and made a part hereof and marked Exhibit "C."

Fifth. That on the 2nd day of January, 1912, Robert M. Betts filed a good and sufficient bond

as required by the order of this Court in said foregoing action and thereby qualified and accepted his trust as receiver therein.

Sixth. That upon the 30th day of April, 1912, The Cornucopia Mines Company of Oregon, respondent in said action and foreclosure proceeding, aforesaid, duly appeared by demurrer and upon said demurrer being overruled, a decree order pro confesso was made in said action, that said demurrer and order pro confesso as aforesaid are hereby made a part hereof and marked Exhibits "D" and "E"; that thereafter on the 30th day of April, 1912, a judgment and decree of foreclosure in favor of The Hamilton Trust Company, complainant, and against The Cornucopia Mines Company of Oregon, and Valentine Laubenheimer and S. W. Holmes, respondents, was duly made, filed and entered in said action, decree and foreclosing the mortgage bonds set forth in complainant's bill of complaint which said judgment and decree of foreclosure is hereby made a part hereof and marked Exhibit "F."

Seventh. That under said judgment and decree of foreclosure, as aforesaid, duly made by this Court, a sale was had of said property of respondent, Cornucopia Mines Company of Oregon, on the 29th day of June, 1912, by Ed. Rand, a special master duly appointed to make such sale under said judgment and decree of foreclosure, that said master, who duly qualified under the appointment of

this Court as such master to make said sale, duly made said sale under the judgment and decree of this Court in front of the courthouse in Baker City, Baker County, Oregon, in which said county and state said property described in complainant's bill of complaint was situate; that said property was duly advertised for sale by publication thereof in two newspapers as shown by the master's return of said sale and his doings under his appointment and sale of said property aforesaid; that thereafter on the 5th day of July, 1912, said Ed. Rand, as such Master of this Court made the report of the sale of said property and his doings thereunder, to this Court, a copy of which said Master's Report aforesaid is hereby made a part hereof and marked Exhibit "G."

That on the 6th day of August, 1912, this Court, after the proper period of time had elapsed under the law in such cases made and provided and under the rules of this Court, duly confirmed said Master's Sale of said property as aforesaid; a copy of which order of confirmation of said sale as aforesaid, is hereby made a part hereof and marked Exhibit "H."

That on the 30th day of August, 1912, Robert M. Betts, as receiver in said foregoing named cause, prepared his report as such receiver as aforesaid, and duly filed the same in this Court with his motion thereon that said account be examined and allowed and the receiver discharged; that after the proper period of time elapsing after the filing of

said receiver's report, counsel for receiver was about to present said motion on said final account and discharge of the receiver, but deferred the same solely at the request of Boothe & Richardson, who appear in the action of John L. Bisher, Jr., by his guardian ad litem, against Robert M. Betts, receiver of Cornucopia Mines Company, and said suit is now pending in this Court.

That at the sale of said property under the decree and foreclosure of this Court in said action of the Hamilton Trust Company v. Cornucopia Mines Company of Oregon, et al, which said sale took place as aforesaid on the 29th day of June, 1912, in front of the courthouse in Baker City, Oregon, said property was offered for sale to the highest and best bidder, that at said sale C. E. S. Wood was the highest and best bidder, and said property was bid in and purchased by him at said Master's Sale as aforesaid as trustee.

That at said sale of the properties of The Cornucopia Mines Company of Oregon, described in their bill of complaint filed in this Court on the 5th day of December, 1911, said C. E. S. Wood, as trustee, at said Master's sale, which was held under the order of this Court and the judgment and decree thereof, bid the sum of Four Hundred and Thirty-two Thousand (\$432,000) Dollars as the purchase price, which included the total judgment in the foreclosure and the costs thereof; that after the confirmation of said sale of said property as aforesaid, said C. E. S. Wood, as trustee, received a deed of all

of the mines, stamp mill, electric power plant and other property sold under said sale under said decree and judgment of this Court on the 28th day of June, 1912, from said Special Master, who made said sale under the order of this Court dated the 7th day of October, 1912, which said deed was duly recorded in the Records of Deeds of Baker County, Oregon, on the 10th day of October, 1912, at 2:40 o'clock P. M., of said day; that thereafter, on the 7th day of October, 1912, C. E. S. Wood, as trustee, as aforesaid, did make and execute and acknowledge a deed conveying all of said mines, stamp mill, electric power plant and other property of The Cornucopia Mines Company of Oregon, purchased by him at the aforesaid sale on the 28th day of June, 1912, by which deed he hath granted, bargained, sold and conveyed as said trustee, for full value received, all of said property of Cornucopia Mines Company to the Cornucopia Mines Company of New York, a corporation duly organized under the laws of the State of New York and doing business within the State of Oregon, in full compliance with the laws of the State of Oregon, and conducting business in said state as such corporation; that said Cornucopia Mines Company of New York, as aforesaid, is in no wise connected with the Cornucopia Mines Company of Oregon, respondent in this action, but is composed in large part of the general purchasers and owners of the mortgage bonds of Cornucopia Mines Company of Oregon, which were foreclosed in this action in this Court;

That said Cornucopia Mines, formerly owned by The Cornucopia Mines Company of Oregon, previous to the 28th day of July, 1912, were being operated and conducted under and by virtue of a duly executed lease by The Cornucopia Mines Company of Oregon to Robert M. Betts, which said lease was in full force and effect from the first day of November, 1911, to the first day of November, 1912;

That the alleged injury to John L. Bisher, Jr., as alleged in his complaint against Robert M. Betts as receiver, in his said action in this Court, took place on a date and day, to-wit, the 28th day of July, 1912, when the said mines were being operated and conducted by the said Robert M. Betts as lessee;

That the foreclosure proceeding in the cause of the Hamilton Trust Company v. Cornucopia Mines Company of Oregon, et al, in this Court, was fully determined and concluded under the laws of the United States and of the State of Oregon and the rules of this Court and the procedure thereof, prior to the commencement of the action of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, v. Robert M. Betts, Receiver of Cornucopia Mines Company, in this Court; that said suit was not filed and instituted in this Court until after the full and final determination of the foreclosure proceeding in the case of Hamilton Trust Company v. Cornucopia Mines Company, et al, in this Court, and after the confirmation of the sale of the property sold under the foreclosure in said cause by this Court was made and determined; that summons in

said action of said John L. Bisher, Jr., for damages as aforesaid, was not served upon the defendant in said action, Robert M. Betts, receiver of Cornucopia Mines Company of Oregon, until the day of November, 1912; that on the 28th day of July, 1912, said Cornucopia Mines Company of Oregon and said Robert M. Betts, receiver thereof, were not in the possession of, the owner of, or holding or operating the Cornucopia Mines, but said mines and properties on said date were held by and in the possession of C. E. S. Wood, as trustee, and were being conducted and operated by Robert M. Betts as lessee: that at the time as heretofore alleged, when said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, filed and instituted his action for damages against said Robert M. Betts, as receiver of Cornucopia Mines Company of Oregon, all of the mines and properties, real and personal, which the said John L. Bisher, Jr., by his said guardian, now asks to have set aside and be permitted to intervene herein, were owned by and were in the possession, for a valuable consideration, of The Cornucopia Mines Company of New York, a corporation duly organized under the laws of the State of New York, and doing business as such under the laws of the State of Oregon in full compliance therewith as aforesaid.

WHEREFORE, complainant and respondent in this action having fully presented the facts herein to the Court, respectfully prays that intervenor's petition to intervene in this cause be denied, and that complainant and respondent herein have such other

and further relief as may be meet and equitable in the premises, and for their costs.

EMMETT CALLAHAN,
Attorney for Respondent.

District of Oregon,
County of Multnomah.—ss.

Due service of the within Reply to show cause is hereby accepted in Multnomah County, Oregon, this 20th day of June, 1913, by receiving a copy thereof. duly certified to as such by Emmett Callahan, attorney for respondent.

BOOTHE & RICHARDSON,
Attorneys for Intervenor.

Filed June 20th, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 12th day of December, 1913, there was duly filed in said Court, and cause, a Motion to Strike Out Parts of Answer to Order to Show Cause, in words and figures as follows, to-wit:

Motion to Strike Out.

Comes now the intervener John L. Bisher, Jr., by John L. Bisher, his Guardian ad litem, with leave of the Court first had and obtained, and within the time allowed by the Court therefor, and moves the Court to strike out, as insufficient to comply with

the order and rule of this Court to show cause, and as insufficient in law or otherwise to comply with the order of the Court therefor, any and all of the following portions of the answer which was made by Hamilton Trust Company and Robert M. Betts, receiver, in response to the order of this Court to show cause, to-wit:

First.

Intervener moves to strike out from such answer any and all of the first paragraph thereof, for the reason that it is insufficient to comply with the order of the Court, and is insufficient in law.

Second.

Intervener moves to strike out from such answer any and all of the sixth paragraph thereof, for the reason that it is insufficient to comply with the order of the Court, and is insufficient in law.

Third.

Intervener moves to strike out from such answer any and all of those portions of the seventh paragraph of such pretended answer, for the reason that they are insufficient to comply with the order of the Court, and are insufficient in law, as follows, to-wit:

(1) All that portion of paragraph seven of such answer, on page 4 thereof, commencing with the words "That under said judgment and decree," and

ending with the words "Hereby made a part hereof and marked Exhibit G."

(2) Any and all of that portion of paragraph seven of such answer, found on page 4, commencing with the words "That on the 6th day of August, 1912," and ending with the words "Hereby made a part hereof and marked Exhibit H."

(3) Any and all of that portion of said paragraph seven, on page 4 thereof, commencing with the words "That on the 30th day of August, 1912," and ending with the words "And said suit is now pending in this Court."

(4) Any and all of that portion of such paragraph seven, found on page 5 of said answer, commencing with the words "That at the sale of said property," and ending with the words "Master's sale as aforesaid as Trustee."

(5) Any and all of that portion of paragraph seven of such answer, found on page 6 thereof, commencing with the words "That at said sale of the properties," and ending with the words "On the 10th day of October, 1912, at 2:40 o'clock P. M. of said day."

(6) Any and all of that portion of said paragraph seven of said answer, on page 6 thereof, commencing with the words "That thereafter, on the 7th day of October, 1912, C. E. S. Wood, as trustee," and ending with the words "Is in no wise connected with the Cornucopia Mines Company of Oregon, respondent in this action."

(7) Any and all of that portion of paragraph seven of such answer, on page 7 thereof, commencing with the words "That said Cornucopia Mines," and ending with the words "To the 1st day of November, 1912."

(8) Any and all of that portion of said paragraph seven of such answer, on page 7 thereof, commencing with the words "That the alleged injury to John L. Bisher, Jr.," and ending with the words "By the said Robert M. Betts, as lessee."

(9) Any and all of that portion of paragraph seven of such answer, found on page 7 thereof, commencing with the words "That the foreclosure proceeding in the cause," and ending with the words "Until theday of November, 1912."

(10) Any and all of that portion of paragraph seven of such answer, on page 7 thereof, commencing with the words "That on the 28th day of July, 1912," and ending on page 8 thereof with the words "And were being conducted and operated by Robert M. Betts, as lessee."

(11) Any and all of that portion of paragraph seven of said answer, on page 8 thereof, commencing with the words "That at the times as heretofore alleged," and ending with the words "State of Oregon in full compliance therewith, a aforesaid."

And,

Fourth.

Intervener moves to strike out the whole and every part of such answer for the reason that it is

insufficient to comply with the order and rule of this Court to show cause, and is insufficient in law, and that such answer does not comply with the rule or order of the Court to show cause and does not show cause.

This motion is made and based and will be heard upon the records and files, papers and preceedings, and the minutes of this Court in the suits and actions in the following causes pending in this Court, to-wit:

Hamilton Trust Company vs. The Cornucopia Mines Company, et al, and John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, vs. Robert M. Betts, receiver.

BOOTHE & RICHARDSON and
CHARLES A. JOHNS,

Attorneys for Intervener John L. Bisher,
Jr., by John L. Bisher, his guardian
ad litem.

State of Oregon,
County of Multnomah.—ss.

Due and legal service of the within motion is hereby acknowledged and accepted in said county and state by the receipt of a duly certified copy thereof on this 12th day of December, 1913.

C. E. S. WOOD,
of Attorneys for Hamilton Trust Company
and Robert M. Betts, Receiver.

Filed December 12th, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Monday, the 22nd day of December, 1913, the same being the 42nd Judicial day of the regular November, 1913, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order to Pay Judgment.

Now, on this 22nd day of December, 1913, this cause coming on to be heard on motion of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, intervener, to strike out certain portions and the whole of the answer of Hamilton Trust Company and The Cornucopia Mines Company of Oregon and Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, for the reason that each of said respective answers is insufficient to comply with the order and rule of this court to show cause, and is insufficient in law or otherwise to comply with the order and rule of this Court to show cause, and is insufficient in law or otherwise to comply with the order of the Court therefor; The Hamilton Trust Company, complainant, and the said Robert M. Betts, as receiver, appearing by Wood, Montague & Hunt, as their attorneys, and The Cornucopia Mines Company of Oregon appearing by Emmett Callahan, as its attorney, and John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, appearing by Boothe & Richardson and Charles A. Johns, as his attorneys, and the Court having heard

the arguments of respective counsel, and being fully advised, it is therefore, ORDERED, ADJUDGED AND CONSIDERED by the Court that the said motion of intervener John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, shall be, and in all things and respects is, hereby sustained.

And if further appearing to the satisfaction of the Court, from the records, files and proceedings in this suit:

I.

That on the 5th day of December, 1911, a suit in equity was filed in this Court to foreclose a mortgage for the sum of Three Hundred and Ninety-nine odd Thousand Dollars, in which Hamilton Trust Company was complainant, and The Cornucopia Mines Company of Oregon, Valentine Laubenheimer and S. W. Holmes were respondents, in which the Court had and acquired jurisdiction of the defendants and the subject-matter of the suit.

II.

That in such suit the complainant, said Hamilton Trust Company, filed a motion based upon the bill of complaint and the affidavit of Emmett Callahan, attached thereto and made a part thereof, asking for the appointment of a receiver, and that on the 21st day of December, 1911, an order of the Court was made appointing a receiver, and that thereafter, and on the 21st day of January, 1912, Robert M. Betts was duly appointed a receiver of the said The Cor-

nucopia Mines Company of Oregon, and duly qualified as such.

III.

That among other things it was recited in and appears from the affidavit of the said Emmett Calahan:

“That it is necessary that said mines should continue in operation and development; that if said mines were closed down and ceased to be operated and developed, great irreparable injury and loss would occur by said mines being closed down and not operated; that if said mines are not continued in operation and development, the stamp mill, electric power plant, engines, pumps and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes and other underground openings and workings of said Cornucopia Mining claims and mines would cave in and be greatly damaged, and great loss follow by the action of the elements and the flooding of said openings in said mines and mining claims filling up with water, deteriorating, destroying and damaging said mines and mining claims, its buildings and operating plants in a reasonably estimated sum of at least from forty to one hundred thousand dollars.”

IV.

That at the request of said Hamilton Trust Company, and based upon such motion and affidavit and the records and files in this suit, and on the 21st day of December, 1911, the Court made an order appoint-

ing Robert M. Betts receiver of all the property and authorized and directed him to take immediate possession of all and singular the said real and personal property, and to continue the operation of said mining property and every part and portion thereof as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so, and directing that he should execute a bond in the sum of \$2,500, and that The Cornucopia Mines Company of Oregon and all other persons or corporations, should turn over and deliver to said receiver any and all of said property into his hands and into his control. Further, that out of the moneys:

“Which come into the hands of said receiver from the operation of said property, or otherwise, he shall pay the necessary expenses incident to the operation of the said property and hold the remainder, if any there be, subject to the order of the Court herein, and this appointment is made on condition that the said Robert M. Betts shall not receive any compensation for his services as such receiver from any of the parties herein, and that he obey the orders of the Court as made from time to time.”

That such bond was executed and that the receiver qualified and entered upon the discharge of his duties under the said order of the Court, and was such receiver and engaged in the operation of the mine and discharge of his said duties during the

month of July, 1912, and at the time of the injury to the said John L. Bisher, Jr., as hereinafter stated.

V.

That on the 30th day of April, 1912, a decree of foreclosure was duly entered in said suit, and that it was provided in such decree that the proceeds of such sale should be applied as follows:

First.

To the expenses of the sale of said property.

Second.

To the expenses of the receivership herein.

Third.

The costs of this suit.

Fourth.

Complainant's attorneys' fees.

Fifth.

The taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.

Sixth.

The balance to the bond holders.

Seventh.

Any amount remaining, to The Cornucopia Mines Company of Oregon.

And it was therein further provided :

“At the time of the execution of said deed, said Robert M. Betts as receiver shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said company; that upon the execution and delivery of the conveyance, as aforesaid, the purchaser shall be let into possession of all of the said property.”

VI.

The decree further provides :

“That any purchaser of the property at such sale shall be entitled to use and apply, in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of the purchase price shall be paid in cash to provide funds for the payment of all costs and expenses incurred herein, and that the Master return the cash proceeds of said sale to the clerk of this Court, and that the same be paid to the clerk of this Court, and that upon the completion and confirmation by the Court of the sale made under and in pursuance of this decree. the said clerk of this Court shall pay out said money as above provided.”

VII.

That it appears from the returns of the sale of the property, C. E. S. Wood, of Portland, Oregon, as trustee for the bond holders, bid the sum of \$432,000, as evidenced by bonds numbered from 1

to 600 of the par value of \$500 each, with accrued interest thereon.

VIII.

That while the said Robert M. Betts, as receiver, was in the possession of the said property, as such, and engaged in the operation thereof, and in the month of July, 1912, he employed John L. Bisher, Jr., to do certain work for him as receiver, and that the said John L. Bisher, Jr., entered upon the discharge of his duties, and was in such employ at the time he sustained the injuries of which he complains, as hereinafter stated.

IX.

That on or about the 29th of July, 1912, and while the said John L. Bisher, Jr., was in the employ of the said Robert M. Betts, as receiver, and through the negligence of the said receiver, the said John L. Bisher, Jr., received certain physical injuries; and that by reason thereof, and based thereon, said John L. Bisher was by this Court appointed guardian ad litem of the said John L. Bisher, Jr., and, with leave of the Court first had and obtained, commenced and prosecuted an action in this Court against the said Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon; and based upon the allegations of the complaint as to such injuries, and the pleadings, and after a trial before a jury in this Court, such jury returned a verdict against the said Robert M. Betts as receiver of The Cornucopia Mines Company of Oregon, and in favor

of the said John L. Bisher, guardian ad litem of John L. Bisher, Jr., for the sum of \$12,500; and that based upon such verdict a judgment against the said Robert M. Betts, as receiver, in favor of said guardian, was duly entered in this Court on the 11th day of April, 1913, for the sum of \$12,500, and the costs and disbursements of the action, taxed at \$....., and that no part of such judgment has been paid, and that the same is now in full force and effect.

X.

That it appears from the report of the receiver that there are no funds in his hands with which to pay said judgment or any part thereof, and that it further appears, that at the time of making the said sale, there were no funds paid into Court, or to any person by the bond holders, or any other person, for the payment or satisfaction of said judgment, or any part thereof, and that no provision whatever has been made for the payment or satisfaction of said judgment.

XI.

That the injuries which the said John L. Bisher, Jr., sustained and which are the basis of the said judgment against the said receiver, were sustained in the operation and development of the property by the receiver, under the order of the Court appointing him as such.

XII.

That on the 1st day of April, 1905, The Cornu-

copia Mines Company, of Oregon, issued its certain bonds numbered from 1 to 600 inclusive, of the par value of \$500 each, payable on the 1st day of April, 1911, at and to The Hamilton Trust Company, in the City and State of New York, with interest from October 1st, 1905, at the rate of six per cent per annum, payable semi-annually, and that to secure the payment of said bonds, which were issued and sold to the respective purchasers thereof, the said Mines Company made, executed, acknowledged and delivered to the said Hamilton Trust Company, its certain real mortgage upon any and all of the property then owned, or thereafter to be acquired, by the said The Cornucopia Mines Company of Oregon, lying and being situate in the County of Baker and State of Oregon, and described as follows, to-wit:

For description of property described in this order, see Bill of Complaint, pages to

XIII.

That among other things the decree rendered in this suit ordered and directed that the said property should be sold and the proceeds thereof paid out and disbursed as provided for in paragraph V of this order; and that no funds were provided or paid into Court, or elsewhere, for the satisfaction of the said judgment in favor of the said John L. Bisher, guardian ad litem, or any part thereof.

XIV.

That the said judgment in favor of the said John L. Bisher, guardian ad litem of John L. Bisher, Jr.,

together with any claim which he may have arising from or growing out of the injuries sustained by the said John L. Bisher, Jr., and upon which said judgment is based, is an operating charge or expense of the said receiver, and is a superior lien to any lien which was created or existed in favor of the said Hamilton Trust Company against the said The Cornucopia Mines Company of Oregon by reason of the execution of such trust deed or mortgage, or any foreclosure decree rendered thereon, and the issuance and sale of said bonds, and the whole and every part thereof; and is superior to any lien of any person or persons holding any one, or either or all of said bonds issued under such trust deed or mortgage, and the said judgment is entitled to and should be paid in full from and out of any sale of the property or any part thereof, based upon the decree rendered in this Court in favor of the said Hamilton Trust Company and against the said The Cornucopia Mines Company of Oregon; and that the terms and conditions of such decree have not been carried out and have not been followed in this: That no funds were provided or paid into the Court for the payment or satisfaction of such judgment in favor of John L. Bisher, guardian ad litem, or for the release and satisfaction of the claim of John L. Bisher, guardian ad litem, arising from or growing out of the injuries sustained by the said John L. Bisher, Jr., on which said judgment was based, and any lien created by the said trust deed or mortgage is hereby subrogated to the lien of the said John L. Bisher, guardian ad litem.

XV.

That the judgment so rendered in favor of the said John L. Bisher, guardian ad litem of John L. Bisher, Jr., and the claim upon which it was based, are for injuries which the said John L. Bisher, Jr., sustained while in the employ of the said Robert M. Betts, receiver, at and during the time the said Robert M. Betts, receiver, was operating and preserving the property, as such, under the orders and directions of the Court.

XVI.

That the said judgment and the claim upon which it is based, is a superior lien on any and all of the property, both real and personal, which the said receiver purchased or acquired during his receivership, to any mortgage or other lien in favor of the said Hamilton Trust Company, or any bond holders secured by such trust deed, and that the said mortgage or trust deed in favor of the said Hamilton Trust Company is hereby subrogated to such judgment lien.

XVII.

That from and out of any money paid to the clerk of this Court, no part thereof should have been paid out or distributed on any claim or to any persons for any costs or expenses until such time as first, the expenses of the sale of said property, and, second, any and all of the expenses of the receivership in said suit had been paid in full, as provided in the decree in this suit.

XVIII.

That the amount of the claim of said John L. Bisher, guardian ad litem of John L. Bisher, Jr., as evidenced by his judgment against the said Robert M. Betts, receiver, together with the claim upon which it is based, is a part and parcel of the expenses of the receivership herein, and should have been paid or satisfied in full prior to the making of any payment or distribution on the costs of the suit, complainant's attorneys' fees, taxes and other expenses incurred and paid pursuant to the provisions of said mortgage, or to any bond holders, or to The Cornucopia Mines Company of Oregon.

XIX.

That the sale of the said property to the said C. E. S. Wood, trustee for the bond holders, and any conveyance made thereunder, was made, and any title acquired thereby is, subject and inferior to the judgment so rendered in favor of the said John L. Bisher, guardian ad litem of John L. Bisher, Jr., and the claim upon which it is based, against the said Robert M. Betts, receiver, and to any person or corporation as the successor in interest to the said C. E. S. Wood under the said sale.

XX.

That on the 5th day of December, 1911, The Hamilton Trust Company, complainant, vs. The Cornucopia Mines Company of Oregon, et al, respondents, filed its bill of complaint in this Court, praying for a decree in foreclosure against the prop-

erty of the said The Cornucopia Mines Company of Oregon, above described, and that process was issued on the 7th day of December, 1911, and that on said day a motion and application for a receiver was filed in this Court, and that on the 23rd day of December, 1911, all the respondents were duly served, and on the 2nd day of January, 1912, Robert M. Betts filed a good and sufficient bond as receiver and accepted his trust, and on the 30th day of April, 1912, a judgment and decree of foreclosure in favor of the said Hamilton Trust Company and against the said The Cornucopia Mines Company of Oregon, et al, respondents, was duly made, filed and entered in said action, decreeing and foreclosing the mortgage bonds set forth in complainant's bill of complaint. That under said judgment and decree a sale was had of said property on the 29th day of June, 1912, by Ed. Rand, special master, duly appointed to make such sale under said judgment and decree of foreclosure, and that said Ed. Rand duly qualified as such under the appointment of this Court, and made a sale of the said property after notice, and on the 5th day of July, 1912, made and filed a report of such sale with the clerk of this Court. That on the 6th day of August, 1912, this Court made an order confirming said sale of said property. That on the 30th day of August, 1912, Robert M. Betts, as receiver, prepared his report as such receiver, and filed the same in this Court with his motion thereon that said account be examined and allowed and the receiver discharged. That the said property was so sold on the 29th day of June, 1912,

in front of the Court House in Baker City, Oregon, to the said C. E. S. Wood, as trustee, for the bond holders under such trust deed or mortgage.

XXI.

That the injuries sustained by the said John L. Bisher, Jr., were sustained on the 29th day of July, 1912, and that upon a good and sufficient petition, and by leave of the Court, John L. Bisher was appointed by this Court guardian ad litem of the said John L. Bisher, Jr., and on the 12th day of October, 1912, the said John L. Bisher, as guardian ad litem of the said John L. Bisher, Jr., commenced his action in this Court to recover for the injuries sustained by the said John L. Bisher, Jr., and issued process and the same was served, and the defendants therein appeared in this Court, and that thereafter, and on the 11th day of April, 1913, the said cause was tried and the said verdict returned by a jury therein.

XXII.

That on the 20th day of November, 1912, said Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, executed to The Cornucopia Mines Company of New York, a corporation of New York, his certain deed to any and all of the property above described, which deed was filed for record on the 20th day of December, 1912, and recorded in Book 77 of Deeds, page 632, in the County Clerk's office of Baker County, Oregon, and that the deed so executed was and is the deed mentioned,

and which he was directed to execute, in the foreclosure decree.

XXIII.

That the final account of the said Robert M. Betts, as receiver, has not been approved, and he has not been discharged as such receiver.

And the Court being now fully advised, and based upon such findings and upon the records, files and proceedings in this suit, it is, therefore, ordered, adjudged and considered by the Court:

First.

That within thirty days from this date, from and out of the funds which may be in his hands, the receiver is hereby ordered to pay a sufficient amount to the clerk of this Court to satisfy the said judgment in favor of the said John L. Bisher, guardian ad litem of John L. Bisher, Jr.

Second:

That should the said receiver not have sufficient funds in his hands to satisfy said judgment in full within said time, then and in that event The Hamilton Trust Company, complainant, or the bond holders at the time of the rendition of such decree, be and are hereby required to pay to the clerk of this Court, within sixty days from this date, a sufficient sum of money to satisfy such judgment in full.

And for failure or neglect to pay such money to the clerk of this Court within said time, said John

L. Bisher, guardian ad litem of John L. Bisher, Jr., shall have and is hereby granted leave of this Court, on the usual notice therefor, to apply for and obtain an order setting aside the said sale to the said C. E. S. Wood, trustee for the bond holders, and to have the property resold; or second, to apply to the Court for an order authorizing and directing the sale of said property to satisfy the amount of such judgment; or third, for any other or different order or process to enforce and collect such judgment as the Court may think right and proper.

Done and dated this 22nd day of December, 1913.

CHAS. E. WOLVERTON,
Judge.

To the making and granting of such order, and the whole and every part thereof, counsel for Hamilton Trust Company, and for Robert M. Betts, receiver, and for The Cornucopia Mines Company of Oregon, then and there duly excepted, which exception was duly allowed by the Court.

CHAS. E. WOLVERTON,
Judge.

Filed December 22nd, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 8th day of June, 1914, there was duly filed in said Court, a Motion to Vacate Sale of Property, in words and figures as follows, to-wit:

Motion to Vacate Sale.

Comes now John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, by and through Boothe & Richardson and Charles A. Johns, his attorneys, and moves the Court for an order:

First:

To vacate and set aside the sale of the property, mentioned and described in the bill of complaint, to C. E. S. Wood, trustee for the bondholders, and to have the property resold and the proceeds of said sale applied, first, to the expenses of the sale of said property; and second, to the expenses of the receivership herein, including the amount of the judgment rendered in this Court in favor of the said John L. Bisher, Jr. by John L. Bisher, his guardian ad litem, against Robert M. Betts as receiver of The Cornucopia Mines Company of Oregon. Or

Second:

For an order of this Court, authorizing and directing the sale of said property, or so much thereof as may be necessary to satisfy the amount of such judgment, and that the purchaser at such sale be let into possession of the property sold, and that the purchaser at such sale shall have and acquire a title to the property which shall be superior and prior in time and right to any sale of the property which was heretofore made by the said Robert M. Betts as receiver to the said C. E. S. Wood, trustee, or any other person. Or

Third:

For any other or different order or process to enforce and collect such judgment as the Court may think right and proper.

Such motion is based upon the files, records, orders and proceedings of this Court, and in particular on the order of the Court sustaining that certain motion made and entered on or about the 22nd, day of December, 1913, by his Honor Charles E. Wolverton, Judge of said Court, and of which motion you will please take notice.

BOOTHE & RICHARDSON and
CHARLES A. JOHNS,

Attorneys for John L. Bisher, Jr., by John
L. Bisher, his Guardian ad Litem.

State of Oregon,
County of Multnomah.—ss.

Due service of the within Motion by a receipt of a copy thereof is hereby admitted in Multnomah County, Oregon, this 6th day of June, 1914.

C. E. S. WOOD,
Attorney for

EMMETT CALLAHAN,
Attorney for

Filed June 8th, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 8th day of June, 1914, there was duly filed in said Court, a Notice of Motion to Vacate Order of Sale, in words and figures as follows, to-wit:

Notice of Motion.

To Hamilton Trust Company and Robert M. Betts, as Receiver, and to Wood, Montague & Hunt, your attorneys; and to The Cornucopia Mines Company of Oregon, and Robert M. Betts, Receiver, and to Emmett Callahan, your attorney:

You and each of you will please take notice, and are hereby notified, that on Monday, the 15th day of June, 1914, at the hour of 10 o'clock A. M., or as soon thereafter as it can be heard, the intervener, John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, will apply to the Court for an order of the Court:

First:

To vacate and set aside the sale of the property, mentioned and described in the bill of complaint, to C. E. S. Wood, trustee for the bondholders therein, and to have the property resold and the proceeds of said sale applied to the satisfaction of the judgment rendered in this Court in that certain action wherein the said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, was plaintiff,

and the said Robert M. Betts, as receiver, was defendant. Or

Second:

For an order authorizing and directing the sale of said property, or so much thereof as may be necessary to satisfy the amount of said judgment. Or

Third:

For any other or different order or process to enforce and collect such judgment and satisfy the same, as the Court may think right and proper at such hearing.

BOOTHE & RICHARDSON and
CHARLES A. JOHNS,
Attorneys for John L. Bisher, Jr., by John
L. Bisher, his Guardian ad Litem.

State of Oregon,
County of Multnomah.—ss.

Due service of the within Notice of Motion by a receipt of a copy thereof is hereby admitted in Multnomah County, Oregon, this 6th day of June, 1914.

C. E. S. WOOD,
Attorney for

EMMETT CALLAHAN,
Attorney for

Filed June 8th, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Friday, the 10th day of July, 1914, the same being the 5th Judicial day of the regular July, 1914, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Decree.

This cause coming on to be heard in open Court on this 15th day of June, 1914, before His Honor, Charles E. Wolverton, Judge, on motion and application of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, intervener, for an order of this Court to either:

First.

Vacate and set aside the sale of the property, mentioned and described in the complainant's bill of complaint, by Ed. Rand, Special Master, to C. E. S. Wood, trustee for the bondholders; or

Second.

For an order authorizing and directing a sale of said property, or so much thereof as may be necessary, to satisfy the amount of the judgment of John L. Bisher, guardian ad litem of John L. Bisher, Jr., against Robert M. Betts, receiver; or

Third.

For any other or different order or process to enforce and collect said judgment as the Court may think right and proper at such hearing.

Hamilton Trust Company, complainant, and Robert M. Betts, receiver in this suit, appearing by C. E. S. Wood, of the firm of Wood, Montague & Hunt, its and his attorneys; The Cornucopia Mines Company of Oregon, respondent, appearing by Emmett Callahan, its attorney; and John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, appearing by Boothe & Richardson and Charles A. Johns, his attorneys, and the Court having heard the arguments and statements of counsel for the respective parties, and having read and examined the records, files and proceedings in this suit, from which it appears and the Court further finds:

I.

That at the sale of the property of The Cornucopia Mines Company, of Oregon, described in the bill of complaint in this suit, C. E. S. Wood, as trustee for the bondholders, at such sale bid the sum of Four Hundred and Thirty-two Thousand (\$432,000) Dollars as the purchase price, which included the total judgment in the foreclosure and costs thereof.

That on the 7th day of October, 1912, the said Ed. Rand, as Special Master appointed by the Court in this suit, executed his certain deed to the said C. E. S. Wood, as purchaser and trustee for the bondholders under the trust deed or mortgage for any and all of the property therein mentioned and described, and as particularly described in Finding No. XII, which was made by this Court on the 22nd day of December, 1913, and that the said C. E. S.

Wood, who became such purchaser as such trustee, at all such times has been, and is now, one of the attorneys for Hamilton Trust Company, complainant in this suit, and at all times since the application of John L. Bisher, as guardian ad litem, to intervene in this suit was filed, has been and is now one of the attorneys for Robert M. Betts as receiver, that said deed so executed by the said Ed. Rand was delivered and filed for record in the office of the County Clerk of Baker County, Oregon, on the 10th day of October, 1912, and was duly recorded in Book 77 Record of Deeds of said County.

II.

That on the 20th day of November, 1912, Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon in this suit, executed to The Cornucopia Mines Company of New York, a New York corporation, his certain deed as such receiver, for that certain water right appropriation, Application No. 2056 to the State of Oregon through its State Engineer, John H. Lewis, and Permit No. 1060, to appropriate the public waters of the State of Oregon, as follows:

Said water appropriation is taken out of Pine Creek, near the Town of Cornucopia, Baker County, Oregon, for the purpose of generating electric power for operating the stamp mills, machinery and other works and lighting the Cornucopia mines at or near the Town of Cornucopia, Baker County, Oregon. That the point of diversion of said water appropria-

tion is located 38 chains S. 66 degrees 30' W. of N. E. corner of Section 3, Tp. 7 S. R. 45 E., Willamette Meridian, being within the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 3, Tp. 7 S. R. 45, E. W. M., in Baker County, Oregon. Said water appropriation is to be taken from said Pine Creek at foregoing described point of appropriation, by an intake into a flume terminating in the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 3, Tp. 7 S. R. 45, E. W. M., in Baker County, Oregon; the name of the ditch or flume is named Cornucopia Mines Company Flume.

Electric power is to be generated by an electric power plant with Pelton wheels located upon the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M.

Said water appropriation and water right, after being used for said power purposes, is returned to said described Pine Creek at a point S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Tp. 7 S. R. 45, E. W. M., in Baker County, Oregon, which said application and permit were received in the office of John H. Lewis, State Engineer of the State of Oregon, on the 3rd day of February, 1912, and approved by him on the 28th day of February, 1912.

That such deed was duly recorded in the office of the County Clerk of Baker County, Oregon, on December 20th, 1912, in Book 77, Record of Deeds of said County on pages 632 et sequor.

That an amendment of said application No. 2056 and Permit No. 1060 was received in the office of the State Engineer of the State of Oregon on the 27th day of December, 1913, and was recorded in

Miscellaneous Records of such office in Volume 1, Page 292, and that in such amendment the point of diversion is amended to read: "23.13 chains south 48 degrees 38' E. of the center of section line between Secs. 34 and 27, T. 6, S. R. 45, E. W. M., being within the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 34, T. 6, S. R. 45, E. W. M.," instead of "38 chains south 66 degrees 30' W. of the N. E. corner of Sec. 3, T. 7, S. R. 45, E. W. M., being within the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 3, T. 7, S. R. 45, E. W. M.," as indicated by original permit No. 1060.

III.

That the said Robert M. Betts as receiver has never, or at any time, executed any deed to any person or corporation of the property specifically mentioned and described in the decree rendered in this suit in favor of Hamilton Trust Company and against The Cornucopia Mines Company of Oregon; and that the said Robert M. Betts as Receiver has never, or at any time, under the said decree, or under any of the terms or conditions thereof, executed any other or different deed to any person or corporation for any other or different property than the property mentioned and described in said paragraph II, and as therein stated, and that no order was ever petitioned for or made by this Court authorizing or directing the said receiver to execute and deliver any deed or convey any property to any person or corporation unless it was authorized by the decree foreclosing the trust deed or mortgage,

executed by the said The Cornucopia Mines Company of Oregon to the said Hamilton Trust Company.

IV.

That on the 20th day of February, 1912, Alexander McDonald executed to the said The Cornucopia Mines Company of Oregon his certain warranty deed, with full covenants of title, of the following described premises, to-wit:

The following described parcel of real estate, situate, lying and being in the County of Baker, and State of Oregon, to-wit:

Beginning at a point on the half section line that is north 500 ft. from the south line of Section, thence west 484 ft., thence north 450 ft., thence E. 484 ft., thence south 450 ft. to place of beginning, containing five acres, and being a part of the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M.

Together with the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all his estate, title and interest, at law and in equity therein or thereto to the use of the waters of Pine Creek running and flowing through the foregoing described land to be used for any useful purpose that said corporation may use same.

That such deed was recorded on the 5th day of March, 1912, in Book 76 Record of Deeds in the office of the County Clerk of Baker County, Oregon.

V.

That on the 16th day of July, 1912, the said Alexander McDonald executed to the said The Cornucopia Mines Company, of Oregon, his certain other warranty deed, with full covenants of title for the following described premises, to-wit:

The following described parcel of real estate situate lying and being in the County of Baker, and State of Oregon, to-wit:

Beginning at a point on the half section line that is north 300 ft. from the south line of Sec. 3; thence W. 484 ft., thence N. 450 ft., thence E. 484 ft., thence S. 450 ft. to place of beginning, containing five acres, and being a part of the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M.

Also a right of way for the pipe line of The Cornucopia Mines Company of Oregon, over and through that certain portion of the lands described as follows: The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec., for said distance of 3,500 ft., more or less.

The above described premises and right of way are in Tp. 7, S. R. 45, E. W. M., said pipe line to be used for electric and power purposes.

Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining; and also all his estate, title and interest, at law and in equity, therein or thereto to the use of the waters of Pine Creek running and flow-

ing through the foregoing described land to be used for any useful purpose that said Corporation may use same.

That on the 16th day of August, 1912, such deed was recorded in Book 77 Record of Deeds in the office of the County Clerk of Baker County, Oregon.

VI.

That on the 1st day of August, 1912, the said Alexander McDonald executed to the said The Cornucopia Mines Company of Oregon, his certain other warranty deed, with full covenants of title, for the following described premises, to-wit:

All the following bounded and described real property situated in the County of Baker and State of Oregon:

Beginning at a point on the half section line that is north 300 ft. from the south line of Section 3, thence W. 660 ft., thence N. 330 ft., thence W. 660 ft., thence S. 330 ft., to the place of beginning, containing 5 acres and being a part of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. Willamette Meridian, also a right of way 25 ft., in width for pipe line and transmission line from the south line of N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ through the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M., and to be located according to surveys, agreed upon by said Alexander McDonald and Robert M. Betts,

receiver for The Cornucopia Mines Co. of Oregon, the length of his line is not to exceed 3,700 ft.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all my estate, right, title and interest in and to the same, including dower and claim of dower.

That such deed was duly recorded on the 7th day of August, 1912, in Book 77 Record of Deeds in the office of the County Clerk of said Baker County, Oregon.

VII.

That none of the property mentioned and above described in either of the deeds from Alexander McDonald to the said The Cornucopia Mines Company of Oregon is specifically mentioned or described in the said trust deed or mortgage executed by the said The Cornucopia Mines Company of Oregon to the said Hamilton Trust Company. And that each of said deeds were so executed by the said Alexander McDonald after the said Robert M. Betts became receiver and during the time that he was such receiver.

VIII.

That on the 11th day of April, 1913, John L. Bisher, as guardian ad litem of John L. Bisher, Jr., duly recovered a judgment against the said Robert M. Betts as receiver of The Cornucopia Mines Company of Oregon, for the sum of \$12,500.00, and his

costs and disbursements in said action taxed at the sum of \$282.70; and that no part of said judgment has been paid and that it is now in full force and effect.

IX.

That on the 30th day of August, 1912, said Robert M. Betts filed his report as receiver, and that such report has never been approved and that he has never been discharged as receiver; and that he is now receiver in said suit.

X.

That there are no funds in the hands of the receiver with which to pay said judgment or any part thereof.

XI.

That at the time of the injury upon which the judgment against the receiver is based, the said John L. Bisher, Jr., was in the employ of the said Robert M. Betts as receiver, and that the said Robert M. Betts, as receiver, was in the possession of, and operating, maintaining and preserving the property under the orders of this Court, and that the claim for such injuries was based upon and arises from and grows out of an operating charge and expenses against the said property under and during such receivership; and as such, the claim of the said John L. Bisher, as guardian ad litem of John L. Bisher, Jr., against Robert M. Betts, as receiver, and the judgment upon which it is based,

is superior in right and prior in time to any lien created by the mortgage or deed of trust executed by The Cornucopia Mines Company of Oregon to the said Hamilton Trust Company, as to any and all property specifically mentioned and described in such trust deed or mortgage, and as to any and all property thereafter acquired by the said Robert M. Betts, as receiver, or any property thereafter acquired by the corporation during his receivership, or any improvements or betterments placed thereon.

XII.

That the water right appropriation Application No. 2056 and Permit No. 1060, and as amended on December 27, 1913, mentioned and described in Finding No. II, was acquired under and during the receivership, and is not specifically mentioned or described in the trust deed or mortgage, and should be property and assets in the hands of the receiver for the purpose of paying and discharging the debts and operating expenses of the receiver, including the claim and judgment of John L. Bisher, guardian ad litem.

NOW, THEREFORE, based upon the foregoing Findings and the previous Findings made by this Court on December 22nd, 1913, and upon the records, files and proceedings in this Court and in this suit, and testimony taken in open Court, and the knowledge of the Court itself, and the statements and arguments of counsel made in this Court, it is hereby **ORDERED, ADJUDGED and DECREED:**

I.

That the said claim of John L. Bisher, guardian ad litem of John L. Bisher, Jr., and the judgment based upon such claims rendered on the 11th day of April, 1913, for the sum of \$12,500.00 and the costs and disbursements therein taxed at the sum of \$282.70, with interest thereon from that date at the rate of 6% per annum, and arising from and growing out of the injuries sustained by the said John L. Bisher, Jr., on the 29th day of July, 1912, while in the employ of Robert M. Betts, receiver, be and is hereby adjudged to be a prior and superior lien, both in time and right, to any lien which existed or was created by the execution of that certain trust deed or mortgage by the said The Cornucopia Mines Company of Oregon to the said Hamilton Trust Company, on or about the 1st day of April, 1905, to secure the payment of Three Hundred Thousand (\$300,000) Dollars, evidenced by bonds numbered from 1 to 600 inclusive of the par value of Five Hundred (\$500) Dollars each, together with the coupons attached thereto, and which was decreed to be foreclosed in this suit on the 30th day of April, 1912, on any and all of the following property specifically mentioned and described in such trust deed or mortgage, to-wit:

(Description of property sold by Master herein see pages of Complainants Bill, where property sold is fully described.)

And that the purchaser or purchasers, or anyone acquiring or claiming to acquire title to said prop-

erty by virtue of the sale thereof, and the confirmation of such sale, and the execution of the deed therefor, and any successor in interest thereof, takes and holds title to the said premises subject to the said claim and said judgment, and that any such title so acquired by or through such sale is subject and inferior to said claim and judgment.

II.

That the said claim of John L. Bisher, guardian ad litem, and the said judgment upon which it is based, be and is hereby adjudged to be a prior and superior lien, both in time and right to any lien which existed or was created by the execution of the said trust deed or mortgage on any and all of the following described property, to-wit:

That certain water right appropriation, application No. 2056 to the State of Oregon, through its State Engineer, John H. Lewis, and Permit No. 1060 and as amended on December 27th, 1913, to appropriate the public waters of the State of Oregon as follows:

Said water appropriation is taken out of Pine Creek, near the Town of Cornucopia, Baker County, Oregon, for the purpose of generating electric power for operating the stamp mills, machinery and other works and lighting the Cornucopia Mines at or near the Town of Cornucopia, Baker County, Oregon. That the point of diversion of said water appropriation is located 38 chains S. 66 degrees 30' W. of N. E. corner of Section 3, Tp. 7, S. R. 45, E.

Willamette Meridian, being within the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M., in Baker County, Oregon. Said water appropriation is to be taken from said Pine Creek at foregoing described point of appropriation, by an intake into a flume terminating in the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M., in Baker County, Oregon; the name of the ditch or flume is named Cornucopia Mines Company Flume.

Electric power is to be generated by an electric power plant with Pelton wheels located upon the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M.

Said water appropriation and water right, after being used for said power purposes, is returned to said described Pine Creek at a point S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Tp. 7, S. R. 45, E. W. M., in Baker County, Oregon, which said application and permit were received in the office of John H. Lewis, State Engineer of the State of Oregon, on the 3rd day of February, 1912, and approved by him on the 28th day of February, 1912, and as amended on December 27th, 1913, and described in Finding No. II.

The following described parcel of real estate, situate, lying and being in the County of Baker and State of Oregon, to-wit:

Beginning at a point on the half section line that is north 500 ft. from the south line of Section, thence west 484 ft., thence north 450 ft., thence east 484 ft., thence south 450 ft., to place of beginning.

containing five acres, and being a part of the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M.

Together with the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and also all estate title and interest, at law and in equity therein or thereto to the use of the waters of Pine Creek running and flowing through the foregoing described land to be used for any useful purpose that said corporation may use same.

The following described parcel of real estate, situate, lying and being in the County of Baker, State of Oregon:

Beginning at a point on the half section line that is north 300 ft. from the south line of Sec. 3; thence W. 484 ft., thence N. 450 ft., thence E. 484 ft., thence S. 450 ft., to place of beginning, containing five acres, and being a part of the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M.

Also a right of way for the pipe line of The Cornucopia Mines Company of Oregon over and through that certain portion of the lands described as follows:

The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec., for said distance of 3,500 ft. more or less.

The above described premises and right of way are in Tp. 7, S. R. 45, E. W. M., said pipe line to be used for electric and power purposes.

Together with the tenements, hereditaments and

appurtenances thereunto belonging or in anywise appertaining; and also all estate title and interest, at law and in equity, therein or thereto to the use of the waters of Pine Creek running and flowing through the foregoing described land to be used for any useful purpose that said corporation may use same.

All the following bounded and described real property, situated in the County of Baker and State of Oregon:

Beginning at a point on the half section line that is north 300 ft. from the south line of Section 3, thence W. 660 ft., thence N. 330 ft., thence W. 660 ft., thence S. 330 ft. to the place of beginning, containing 5 acres and being a part of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. Willamette Meridian, also a right of way 25 ft. in width for pipe line and transmission line from the south line of N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, through the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7, S. R. 45, E. W. M., and to be located according to surveys, agreed upon by Alexander McDonald and Robert M. Betts, receiver for The Cornucopia Mines Company of Oregon, the length of his line is not to exceed 3,700 feet.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all estate right, title and interest in and to the same, including dower and claim of dower.

And that the purchaser or purchasers, or anyone acquiring or claiming to acquire title to the said property, or any part thereof, by virtue of any sale thereof, or the confirmation of such sale, or the execution of or by virtue of any deed therefor, either from the said Ed. Rand, Special Master in Chancery, or the said Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, or any deed from The Cornucopia Mines Company of Oregon, and any successor in interest under any one or either of said deeds, takes and holds title to the said premises subject to the said claim and the said judgment, and that any title so conveyed or acquired is subject and inferior to said claim and judgment; and that said claim and judgment is a prior and superior lien to any one or either of said conveyances, and of said trust deed or mortgage.

III.

That a lien is hereby declared in favor of the said John L. Bisher, as guardian ad litem of John L. Bisher, Jr., for the injuries sustained by the said John L. Bisher, Jr., on the 29th day of July, 1912, and the claim based thereon evidenced by the said judgment, for the amount thereof and costs and accrued interest thereon and such lien is hereby declared to be and exist upon any and all of the property mentioned and described in such trust deed or mortgage, and on any and all property thereafter acquired by the said The Cornucopia Mines Company of Oregon, or the said Robert M. Betts as receiver thereof; and that for the payment and

satisfaction of said claim and lien, all of the said property is hereby seized, and any and all of said property is hereby declared to be subject to such lien and such claim of the said John L. Bisher, guardian ad litem, and the said lien is hereby declared to be superior and prior in time and right to the said lien created by said trust deed or mortgage, and on any property conveyed to or acquired by the said The Cornucopia Mines Company of Oregon after the execution of such trust deed or mortgage, and on any and all property conveyed to or acquired by the said Robert M. Betts as receiver thereof; and that any purchaser or purchasers of said property or any part thereof, took their respective conveyances and acquired any title they may have thereto, subject to the said claim and to the said judgment.

IV.

That to satisfy such claim and such lien, it is further ORDERED, ADJUDGED and DECREED that, in default of the payment of satisfaction of such lien or judgment:

First.

That any and all of said property which was conveyed to or acquired by the said The Cornucopia Mines Company of Oregon, or the receiver thereof, on and after the said Robert M. Betts was appointed and qualified as such receiver, as mentioned and described in Findings No. II and Findings No. IV, V and VI of this decree, or such portion thereof as may be necessary, shall be sold as hereinafter provided.

Second.

Should the proceeds of such sale be not sufficient to satisfy this decree, that any and all of the property mentioned and described in such trust deed or mortgage, and as specifically described in paragraph I of this decree, shall be sold.

Third.

That for the purpose of making such sale, Ed. Rand, the present sheriff of Baker County, Oregon, is hereby appointed Special Master of this Court. That any and all of such property mentioned and described in the First Subdivision of this paragraph shall be sold as one property and not in separate parcels, to satisfy the amount due and to become due on such claims and the judgment based thereon, together with the costs and disbursements in that action and accrued interest thereon, and for the costs of sale; and that in the event the proceeds of such sale are not sufficient to satisfy such claim and judgment, with costs and accruing costs, then any and all of the property mentioned and described in paragraph I of this decree shall be sold as one property and not in separate parcels, to satisfy any amount remaining due or to become due on such claim and the judgment based thereon, together with the costs and disbursements in that action, with accrued interest thereon and costs of sale; and that the said Ed. Rand, Special Master, make such sale in accordance with the orders and practice of this Court, and that at any such sale or sales the said

John L. Bisher, guardian ad litem, may become the purchaser, and that any and all of the property ordered to be sold under this decree shall be sold at public sale to the highest bidder, between 9 o'clock in the morning and 4 o'clock in the evening, at the door of the courthouse of said Baker County in the City of Baker, the county seat thereof. That notice of such sale shall be given by said Master by publication thereof once each week for four successive weeks preceding the date of sale in the Pine Valley Herald, a weekly newspaper of general circulation in said Baker County; that said notice shall contain a statement of the time and place of sale, the terms and conditions thereof and a description of the property to be sold.

And it is further ORDERED, ADJUDGED and DECREED by the Court that in the event the said John L. Bisher, guardian ad litem, should become the purchaser at such sale, he shall be entitled to use and apply in payment of the purchase price thereof the amount of the said claim and judgment, but that a sufficient portion of the purchase price should be paid in cash to provide moneys for the payment of all costs and expenses incurred in the making of such sale, and that the Master return any cash proceeds of said sale to the clerk of this Court, and that the same be paid to the clerk of this Court, and upon the completion and confirmation by the Court of the said sale, made under and pursuant to this decree, the said clerk shall pay out such moneys as follows:

1. To the expenses of the sale of said property.
2. To the satisfaction of the said claim and judgment of the said John L. Bisher, guardian ad litem, against Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, and
3. That any amount then remaining shall be paid out and distributed upon the further order of this Court.

That upon the making of such sale, the purchaser thereof shall be let into the immediate possession of any property so sold, and that a Writ of Assistance may and shall issue to put such purchaser into possession, and that upon the completion and confirmation of and sale made under and pursuant to this decree, unless the said property so sold be redeemed, or the said judgment otherwise satisfied, said Ed. Rand, as such Special Master, shall make, execute and deliver to the purchaser or purchasers of said property a good and sufficient deed of conveyance thereof, in fee simple, free and clear of any and all charges, liens or incumbrances which deed shall specify the property so conveyed and the sum paid therefor.

And it is further ADJUDGED and DECREED that the purchaser at such sale, and to whom such deed shall be so executed, shall have a title to said property so conveyed which shall be superior in right and prior in time to any title conveyed by any deed executed by the said Ed. Rand, as Special Master, in the former sale based upon the decree rendered in this suit in favor of the said Hamilton Trust

Company and against The Cornucopia Mines Company of Oregon, et al; or to any deed or title which was thereby conveyed, or to any title conveyed by deed or otherwise from said Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, or by the said The Cornucopia Mines Company of Oregon, which was executed after the said Robert M. Betts was appointed and qualified as such receiver, and that such titled shall be superior in right and prior in time to that of any subsequent purchaser or purchaser under any one or either of such former conveyances; and that EXECUTION may issue to enforce this decree at any time on or after this date.

Done and dated at Portland, Oregon, this 10th day of July, 1914.

CHAS. E. WOLVERTON,
Judge.

Filed July 10th, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 30th day of July, 1914, there was duly filed in said Court, and cause, a Petition for Appeal, in words and figures as follows, to-wit:

Petition for Appeal.

To the Honorable Charles E. Wolverton, and Robert S. Bean, United States District Judges for the District of Oregon:

The above named complainant and respondents,

feeling themselves aggrieved by the decree and order made and entered in this cause on the 10th day of July, 1914, do hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error, which is filed herewith, and pray that their appeal be allowed and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree and order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioners further desiring to stay the execution of the decree and order, here tender a good and sufficient bond in the sum of \$15,000.00, and prays that with the allowance of the appeal a supersedeas be issued.

C. E. S. WOOD, R. W. MONTAGUE,
ISAAC D. HUNT, ERSKINE WOOD,
as WOOD, MONTAGUE & HUNT,
Solicitors and Counsel for Complainants
and Respondents.

The above appeal is hereby allowed. Let a writ of supersedeas issue.

CHAS. E. WOLVERTON,
Judge.

Filed July 30th, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 30th day of July, 1914, there was duly filed in said Court, and cause, an Assignment of Errors, in words and figures as follows, to-wit:

Assignment of Errors.

And on now this the day of July, A. D. 1914, came the complainant by Wood, Montague & Hunt and Emmett Callahan, attorneys for complainant, and say that the decree entered in favor and on behalf of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, intervener in the above entitled cause on the 10th day of July, 1914, is erroneous and unjust to complainant, and that it was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and complainant make this, its

ASSIGNMENTS OF ERROR.

I.

The Court erred in permitting John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, to intervene herein, because the District Court of the United States for the District of Oregon, and the Judge thereof, had and have no jurisdiction, right or authority to permit said Bisher to intervene in the above entitled action, or of the matters, things or controversies involved therein, as the matters and

things involved in said suit were fully and finally determined and closed by the final decree of this Court, by its decree made and signed on the 30th day of April, 1914; and the Court and Judge were without jurisdiction to make or grant the decree of this Court made and signed herein on July 10th, 1914.

II.

The Court erred in overruling and denying complainant's motion to dismiss and disallow the petition in intervention filed herein by intervener on May 14th, 1913.

III.

The Court erred in sustaining and allowing the motion made and filed herein by intervenor on the 12th day of December, 1913, dismissing and disallowing the answer of complainant filed herein on the 20th day of June, 1913; and said Judge exceeded his jurisdiction and erred in making and granting said order dismissing the complainant's said answer, said order having been made and filed herein on December 22nd, 1913.

IV.

The Court erred in making a decree herein on the 10th day of July, 1914, wherein it decreed and declared in favor of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, for injuries sustained by said John L. Bisher, Jr., on the 29th day of July, 1912, evidenced by a judgment, costs, and

accrued interest thereon, and such lien was declared to be and exist upon any and all of the property mentioned and described in a certain trust deed or mortgage of complainants therein, and on any and all property thereafter acquired by said The Cornucopia Mines Company of Oregon or the said Robert M. Betts, receiver thereof; and that for the payment of satisfaction of said judgment and lien all of the said property was thereby seized, and any and all of said property was thereby declared to be subject to such judgment lien and such claim of the said John L. Bisher, guardian ad litem, and the said lien declared and decreed in said decree to be superior and prior in time and right to the said lien created by a certain trust deed or mortgage of complainant therein, and on any property conveyed to or acquired by The Cornucopia Mines Company of Oregon after the execution of such trust deed or mortgage, and on any and all property conveyed to or acquired by the said Robert M. Betts as receiver thereof; and that any purchaser or purchasers of said property, or any part thereof, took their respective conveyances and acquired any title they may have thereto, subject to the superior and prior lien in right and time to the lien created by the said judgment in favor of John L. Bisher, guardian ad litem.

WHEREFORE, complainant prays that the said decree made by the District Court of the United States for the District of Oregon on the 10th day of July, 1914, in favor of the petitioner in intervention, be reversed and set aside, and that such

further order be entered herein as will protect the rights and property of complainant.

C. E. S. WOOD, R. W. MONTAGUE,
ISAAC D. HUNT, ERSKINE WOOD,
as WOOD, MONTAGUE & HUNT,
EMMETT CALLAHAN,
Solicitors and Counsel for Complainant.

Filed July 30th, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Thursday, the 30th day of July, 1914, the same being the 22nd Judicial day of the regular July, 1914, term of said Court: present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Allowing Appeal.

On this 30th day of July, 1914, came the above named complainants, by their attorney of record, and filed herein and presented to the Court a petition praying for the allowance of an Appeal herein, praying also that a transcript of the record and proceedings and papers upon which the decree and order was made and rendered on the 10th day of July, 1914, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and such other and further proceedings may be had as may appear proper in the premises.

On consideration whereof the Court orders further proceedings to stay, and does allow the appeal as prayed for, a supersedeas bond to be given in the sum of \$15,000.00.

CHAS. E. WOLVERTON,
Judge.

Filed July 30th, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 30th day of July, 1914, there was duly filed in said Court, and cause, a Bond on Appeal, in words and figures as follows. to-wit:

Bond on Appeal.

Know all men by These Presents:

That we the above named complainants, Hamilton Trust Company, a corporation, duly organized under the laws of the State of New York, and doing business as such corporation in the State of Oregon, as principal, and FIDELITY and CASUALTY COMPANY, a corporation duly organized under the laws of the State of New York and duly licensed as such corporation under the laws of the State of Oregon, for the purpose of making, guaranteeing and becoming sole surety upon bonds and undertakings, does hereby undertake as surety, and is held and firmly bound unto the above named Intervener, John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, in the sum of FIFTEEN THOUSAND

DOLLARS, for the payment whereof well and truly to be made unto the said Intervener above named, said HAMILTON TRUST COMPANY, a corporation complainants, and FIDELITY and CASUALTY COMPANY of New York, a corporation, bind themselves, their successors and assigns jointly and severally by these presents.

Whereas, lately at a term of the District Court of the United States for the District of Oregon in a suit pending in said Court between Hamilton Trust Company, a corporation complainant, and The Cornucopia Mines Company of Oregon, a corporation, et al, respondents, and John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, as INTERVENER therein, the Court made and rendered a decree on the 10th day of July, 1914, ordering a resale of the mines and property theretofore by decree of said Court made in favor of the Hamilton Trust Company, complainant, in the above entitled suit, on the 30th day of April, 1912; that said Court by its decree of July 10th, 1914, as aforesaid, decreed that said intervener named in the above entitled cause had a first and superior lien on the property described in said decrees as aforesaid paramount, superior in right and prior in time to the mortgage bonds described in the Court's decree made in the above entitled cause on April 30th, 1912; and said complainant having obtained a writ of appeal and filed a copy thereof in the clerk's office of said Court to reverse the judgment and decree made by the Court on the 10th day of July, 1914, in the

aforesaid suit and a citation directed to said INTERVENER and admonishing him to be and appear at the next session of the UNITED STATES CIRCUIT COURT OF APPEALS for the Ninth Circuit.

Now, therefore, the condition of the above obligation is such that if the above named complainant, Hamilton Trust Company, a corporation, shall prosecute said writ of Appeal to effect and answer all damages, judgment, costs and interest if it fails to make good its plea, and reverse the said order, decree and judgment of the Court made by said Court on the 10th day of July, 1914, in the above entitled cause, then the above obligation to be void, else to be and remain in full force and virtue.

IN WITNESS WHEREOF, the said Hamilton Trust Company, a corporation, and the FIDELITY and CASUALTY COMPANY, a corporation, have caused these presents to be executed this 29th day of July, 1914.

HAMILTON TRUST CO.,

Complainant.

By C. E. S. WOOD,

Attorney for Hamilton Trust Co.

THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK.

By O. W. DAVIDSON,

Its Attorney in Fact.

(Seal)

Attest: M. E. NEWTON.

Countersigned at Portland, Oregon by Seeley & Co., General Agents.

Examined and approved this 29th day of July, 1914.

CHAS. E. WOLVERTON,
Judge.

Filed July 30th, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 2nd day of October, 1914, there was duly filed in said Court, and cause, a Statement of the Evidence in words and figures as follows, to-wit:

Evidence.

*In the District Court of the United States for the
District of Oregon.*

HAMILTON TRUST COMPANY,
Complainant,

v.

THE CORNUCOPIA MINES COMPANY of Oregon, a corporation, and
Valentine Laubenheimer and S. W.
Holmes,

Respondents.

John L. Bisher, Jr., by John L. Bisher,
his Guardian ad litem,

Intervener.

C. E. S. WOOD and EMMETT CALLAHAN for
Complainant, BOOTHE & RICHARDSON and
CHAS. A. JOHNS for Intervener.

Before CHARLES E. WOLVERTON, Judge.

Testimony of ROBERT M. BETTS, the Receiver.

Portland, Oregon, July 10th, 1914.

Mr. Wood: Mr. Betts is here for examination pursuant to the court order. There was a request in the order that he make a report, but we have asked that the examination be taken, and that will be extended and filed as a report. It seemed unnecessary to duplicate it—if that is satisfactory. Or it can be supplemented with anything further that is required.

COURT: Do you desire to proceed now with the report in that way?

Mr. Wood: Yes.

ROBERT M. BETTS, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Wood: What is your name?

A. Robert M. Betts.

Q. You are receiver for The Cornucopia Mines Company?

A. Yes, sir.

Q. Mr. Betts, there has been some question herein as to properties that were acquired by The Cornucopia Mines Company, deeds to which were executed

by you as receiver, subsequent to the sale to me as trustee at Baker City—I forgot the date myself. I wish you would take up a history of those matters, and make report of it now in Court, exhibiting such deeds and documents as you have.

A. The matter is simply this: The company has never had sufficient power to operate the mine and the mill, and it had been planned on the part of the receivership to extend the present pipe-line further down the creek in order to obtain a higher head, and thereby increase the power; and, as this was necessary for the benefit of the mine, I made application to the State Engineer, and offered to buy a piece of ground from Alexander McDonald.

Q. State when you made this application, if you made the negotiations.

A. The application was made on the 3rd day of February, 1912.

Q. Now, just read into the record, in that connection, the essential part of that paper, just what you applied for. We don't want all its formalities and verbiage, but just a description of what you applied for.

A. Well, I will have to amplify that a little bit by saying that we already owned the water-right, and we merely took the same water and carried it under pressure farther down the creek, but that the State law required that we ask for a permit. So I asked for a permit for 9 1-3 cubic feet per second, the power to be applied for mining purposes.

Q. You asked for that as receiver?

A. I asked for that as receiver.

Q. And the water you already were using—already had the water-rights?

A. We already had the water-rights, since 1895.

Q. And this was not an amplification of that at all?

Mr. Johns: I suggest, Colonel, that these questions are very leading.

Mr. Wood: Oh, they are; I supposed that that was the idea—to get at it.

Q. When you state that in your application you applied for 9 second feet, was it?

A. Yes.

Q. Was that an application for a new water-right?

A. No, sir.

Q. What was it?

A. It was an application to carry this water farther down the creek.

Q. For what purpose?

A. For the purpose of generating more power.

Q. Getting greater head?

A. Getting a greater head.

Q. Well, now, go ahead.

A. I purchased five acres of ground from Alexander McDonald, on which to locate the power-house.

Q. When did you come to an agreement with him for this purchase?

A. The latter part of February, 1912. Now, I would like to say this in regard to this: There seem to be three deeds. The way that occurred, there was

some placer mining going on, and for fear that these men who wanted placer ground might tie McDonald up, I got him to deed me five acres of ground; but it was later determined, when the pipe-line was surveyed, that the ground covered by the original deed did not quite cover the ground on which we wished to place the power-house. Then another deed was made to cover this.

Q. Have you got those deeds?

A. I have, yes, sir.

Q. I wish you would read the essential parts of them into the record—the date and the signatures and the description. And before you do that, Mr. Betts, state who furnished the money for these purchases.

Mr. Johns: Objected to as immaterial.

COURT: I suppose that will come probably in the report anyhow.

A. It is covered by the report now.

COURT: Have you made a report in this case?

A. Yes, your Honor.

Q. Just state who furnished the money, and produce the vouchers showing it.

A. Well, the money was furnished by the receiver and the lessee. The bank account as carried is "Robert M. Betts, Receiver."

Q. Where did the funds originate? Where did they come from? From the earnings of the mine?

A. Yes, sir.

Q. They were not sent forward from New York?

A. Not those funds, no, sir.

Q. I was asking the question because I was under the belief that those funds were sent from New York.

A. No. A great deal of funds were sent, but not those.

Q. Well, that is all right. Now, will you read the deeds, giving the dates, and the grantor, and the grantee, and the description? Also the place and time of record.

A. July 16th, 1912, deed from Alexander McDonald to Cornucopia Mines Company of Oregon. Now, I hardly see why it is necessary to read all this description into the record. It merely covers almost the identical ground. It was a good deal like this desk—the first plot of ground was more square, and was not long enough—and as we only bought five acres we had a new survey made, and made it longer and not so wide.

Q. But still it was five acres in quantity?

A. It was five acres in quantity.

Mr. Wood: Well, unless Mr. Johns wants it, I don't see the importance of a full description.

Mr. Johns: I think we would like to have all those descriptions read.

COURT: Very well.

Mr. Wood: May it please the Court, I am due over in the State Court at this time, and I will ask to be excused for a time, anyway.

COURT: Very well.

A. "Beginning at a point on the half section line

that is north 300 feet from the south line of section 3; thence west 484 feet; thence north 450 feet; thence east 484 feet; thence south 450 feet to place of beginning; containing five acres, and being a part of the southeast quarter of the southwest quarter of Section 3, Township 7 South, Range 45, E. W. M."

COURT: When was that deed recorded, and where?

A. July 16th, recorded in Baker City.

Mr. Callahan: Baker County?

A. Baker County.

Mr. Johns: Just a moment. That is not all of the description.

A. It says, "Also a right of way for the pipeline of The Cornucopia Mines Company of Oregon, over and through that certain portion of the lands described as follows: The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section 3"—

Mr. Johns: Is that 3 in that deed?

A. No, it doesn't say, but that is the section I thought it was.

Mr. Johns: The figure "3" is not here?

A. It is not here. I thought it was a typographical error. This is the original deed. Well, we will leave the section out. (Continues reading) "for said distance of 3,500 feet, more or less. The above described premises and right of way are in Township 7 S, R. 45, E. W. M., said pipe line to be used for electric and power purposes." Do you want me to read any more?

Mr. Johns: That is the description. That is all there is. Well, now, just a moment. I don't want to seem particular about this, but I want to show when that deed was recorded, the book and page it was recorded, and also want to show the consideration for the deed.

A. The consideration was \$250.00.

Mr. Callahan: \$250.00?

Mr. Johns: I mean the consideration expressed in the deed.

A. \$250.00. And it was filed for record August 16th, 1912, in Baker County.

Q. Book 77 of Deeds, page 209?

A. Yes, Book 77, page 209. Now, the next deed is dated August 1st, 1912, from Alexander McDonald to The Cornucopia Mines Company of Oregon. The description, "Beginning at a point on the half-section line that is north 300 feet from the south line of section three; thence west 660 feet"—you see, Mr. Johns, it is made longer than the other one.

Mr. Johns: I understand that. All we are asking for is to read those descriptions in the record.

A. All right. (Continues reading.) "Thence north 330 feet; thence east 660 feet; thence south 330 feet to the place of beginning. Containing five acres and being a part of the Southeast $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section three, Tp. 7 South, Range 45, E. Willamette Meridian. Also a right of way twenty-five feet in width, for pipe-line and transmission line from the south line of Northeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$, through the Southeast $\frac{1}{4}$ of the

Northwest $\frac{1}{4}$, the Northeast $\frac{1}{4}$ of the Southwest $\frac{1}{4}$, the Southeast $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section three, 1p. seven South, Range 45, E. W. M., and to be located according to surveys agreed upon by said Alexander McDonald and Robt. M. Betts, receiver for The Cornucopia Mines Company of Oregon; the length of this line is not to exceed thirty-seven hundred feet."

Consideration \$250.00. Filed for record the 7th day of August, 1912. Book 77, page 183.

COURT: Do I understand this covers practically the same land that was covered by the prior deed?

A. It covers the same ground, yes, sir, and there was no more money consideration. That is, we didn't pay him any more money.

Direct examination continued by Mr. Callahan.

Q. Mr. Betts, do I understand that you put the same number of acres in this latter deed that has been read into the record as is included in the former?

A. Yes, sir.

Q. You simply extended it in a different form and shape?

A. Yes, sir, that is all. We made it more rectangular.

COURT: Well, the two deeds together, then, would make more than five acres that you got?

A. Well, they would.

COURT: You have not re-deeded?

A. No, I have not re-deeded.

Q. Follow that up with the other deed, Mr. Betts.

A. From me as receiver, you mean?

Q. The receivership deed.

A. Now, as I understand the matter, these improvements being contemplated prior to the receivership, and being more or less necessary—

Mr. Johns: Just a moment. I don't care to argue this case with the witness, nor to have the witness argue it with us. As far as we are concerned, we simply want the facts. I think the understanding of the witness is immaterial and unimportant.

A. Well, the facts themselves are in the deed, Mr. Johns.

Q. Go on, Mr. Betts.

A. I supposed that the water-right and this deeded land from McDonald went with the property covered by the mortgage. That was my interpretation of the mortgage. But the water-right in Salem stood on record as "Robert M. Betts, Receiver," so I wrote a note to the State Engineer and asked him to change that to the name of The Cornucopia Mines Company of New York—the new owners. In reply, he stated that request like that was not sufficient; that it had to be something to be written into the records. So he asked for a deed to be made out to be placed on file. The deed, which is this deed,—

Q. That is what is known as the Receiver's Deed, then, is it?

A. Yes. It was made out and sent to Salem for record, and that is all there was of the matter.

COURT: Give the date of the deed, and read the description. This deed is from you?

A. From me to Cornucopia Mines Company of New York. The date of the deed is November 20th, 1912, from Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, to The Cornucopia Mines Company of New York. The description is as follows:

“Water right and appropriation numbered application No. 2056, to the State of Oregon through its State Engineer John H. Lewis, and permit numbered 1060 to appropriate the Public Waters of the State of Oregon.

“Said water appropriation is taken out of Pine Creek, near the Town of Cornucopia, Baker County, Oregon, for the purpose of generating electric power for operating the stamp mills, machinery and other works and lighting the Cornucopia mines at or near the Town of Cornucopia, Baker County, Oregon. That the point of diversion of said water appropriation is located 38 chains S. 66 degrees 30' W. of N. E. corner of section 3, T. 7 S. of Range 45, E. Willamette Meridian, being within the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 3, T. 7 S., Range 45, E. W. M., in Baker County, Oregon. Said water appropriation is to be taken from said Pine Creek at foregoing described point of appropriation by an intake into a flume terminating in the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 3, Tp. 7 S., Range 45, E. W. M., in Baker County, Oregon; the name of the ditch or flume is named Cornucopia Mines Company Flume.

“Electric power is to be generated by an electric power plant with Pelton wheels, located upon the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7 S., Range 45, E. W. M.

“Said water appropriation and water-right, after being used for said power purposes, is returned to said described Pine Creek at a point S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Tp. 7 S., Range 45, E. W. M., in Baker County, Oregon.

“For a fuller and accurate description of the said water-right and appropriation hereby granted and conveyed by this deed, reference is hereby made to application No. 2056, and permit No. 1060, in the office of the State Engineer, of Oregon, at Salem, Oregon; received by said engineer for the State of Oregon, at his said office on the 3rd day of February, 1912, at 8 o'clock A. M., and approved by said John H. Lewis, State Engineer of Oregon, on February 28th, 1912.”

Q. Mr. Betts, read the first part of that deed into the record. This is the original deed, is it?

A. This is a copy of the original deed.

“This deed, made this 20th day of November, 1912, between Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, a corporation organized under and by virtue of the laws of the State of Maine, and owning and holding mining and real property in Baker County, State of Oregon, party of the first part, and The Cornucopia Mines Company of New York, a corporation duly organized under and by virtue of the laws of the State of New York, the party of the second part:

“Whereas, the said receiver as aforesaid, by virtue of the authority vested in him as receiver by a duly made and signed order of the United States District Court for the State of Oregon, made by said Court on the 21st day of December, 1912, appointing said Robert M. Betts the receiver of all the property, real and personal, of The Cornucopia Mines Company of Oregon; that said Robert M. Betts, under and by virtue of said foregoing order of said Court, did thereafter give bond and did duly qualify as such receiver, and is now the duly appointed, qualified and acting receiver of The Cornucopia Mines Company of Oregon, a corporation;

Now, therefore, this deed witnesseth, that the said Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, a corporation, does hereby as such receiver hereby convey and grant unto The Cornucopia Mines Company of New York, a corporation, under and by virtue of the order and direction of the said United States District Court for Oregon, made upon the 30th day of April, 1912, the following described real property and water-right and water appropriation, to-wit:”

Q. Now, Mr. Betts, turn to the application to the State Engineer for the water appropriation.

Mr. Johns: Just a moment. Have you the application?

Mr. Callahan: It is here.

Mr. Johns: Why not offer it in evidence?

Mr. Callahan: That is what we are going to do—identify it.

Q. You identify this, Mr. Betts, as the original application?

A. This is the original application as made by me to the State Engineer.

Mr. Callahan: I offer this in evidence, and ask that it be copied into the record.

The paper reads as follows:

“Permit No. 1060.

Application for a Permit to Appropriate the Public Waters of the State of Oregon.

I, Robt. M. Betts, of Cornucopia, County of Baker, State of Oregon, do hereby make application for a permit to appropriate the following described public waters of the State of Oregon, subject to existing rights:

1. The source of the proposed appropriation is Pine Creek.

2. The amount of water which the applicant intends to apply to beneficial use is 9 1-3 cubic feet per second.

3. The use to which the water is to be applied is Power for Mining Purposes.

4. The point of diversion is located 38 chains S. 66 degrees 30" W. of N. E. corner of Sec. 3, T. 7 S., R. 45, E. Willamette Meridian, being within the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 3, Tp. 7 S., R. 45 E., W. M., in the County of Baker.

5. The Flume to be .62 miles in length, termin-

ating in the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec.-3, Tp. 7 S., R. 45 E., W. M., the proposed location being shown throughout on the accompanying map.

6. The name of the ditch, canal or other works is Cornucopia Mines Company Flume.

Description of Works.

Diversion Works—

7. (a) Height of dam, etc. (Blank.)
(b) Description of headgate. Timber.

Canal System—

8. (a) Give dimensions of each point of canal where materially changed in size, stating miles from headgate. At headgate: Width on top (at water line) 4 feet; width on bottom, 4 feet; depth of water, 1 foot; grade, 5 feet fall per one thousand feet.

(b) At ——— miles from headgate: Width on top (at water line), 4 feet; width on bottom, 4 feet; depth of water, 1 foot; grade, 5 feet fall per one thousand feet.

Same size all along.

Fill in the following information where the water is used for irrigation:

9. (Blank).

Power, Mining, Manufacturing, or Transportation
Purposes—

10. (a) Total amount of power to be developed, 500 horsepower.

(b) Total fall to be utilized, 470 feet.

(Head)

(c) The nature of the works by means of which the power is to be developed, Electric Plant with Pelton Wheel.

(d) Such works to be located in S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, Tp. 7 S., R. 45 E., W. M.

(e) Is water to be returned to any stream?
Yes.

(f) If so, name stream and locate point of return. Pine Creek.

S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Sec. 3, Tp. 7 S., R. 45 E., W. M.

(g) The use to which the power is to be applied is Running Quartz Mill and Compressors.

(h) The nature of the mines to be served. Cornucopia Mines Co.

Municipal Supply—

11. (Blank).

12. Estimated cost of proposed works, \$15,000.

13. Construction work will begin on or before June 1st, 1912.

14. Construction work will be completed on or before October 15th, 1912.

15. The water will be completely applied to the proposed use on or before November 1st, 1912.

Duplicate maps of the proposed ditch or other

works, prepared in accordance with the rules of the Board of Control, accompany this application.

ROBT. M. BETTS,
Receiver of Cornucopia Mines Company
of Oregon.

Signed in the presence of us as witnesses:

- (1) R. C. BISHOP, Cornucopia, Oregon.
- (2) E. C. McFADDEN, Cornucopia, Oregon.

State of Oregon,
County of Marion.—ss.

This is to certify that I have examined the foregoing application and do hereby grant the same, subject to the following limitations and conditions:

The appropriation for power purposes shall be limited to the development of 500 theoretical horsepower. The Priority Date of this Permit is February 3rd, 1912.

The amount of water appropriated shall be limited to the amount which can be applied to beneficial use and not to exceed 9 1-3 (9.33) cubic feet per second.

Actual construction work shall begin on or before February 28th, 1913, and shall thereafter be prosecuted with reasonable diligence and be completed on or before February 28, 1914.

Complete application of the water to the proposed use shall be made on or before February 28th, 1915.

WITNESS my hand this 28th day of February,
1912.

JOHN H. LEWIS,
State Engineer."

INDORSED:

"Application No. 2056.

Permit No. 1060.

PERMIT.

To Appropriate the Public Waters of the State of
Oregon.

Division No. 2.

District No.

This instrument was first received in the office
of the State Engineer at Salem, Oregon, on the 3rd
day of February, 1912, at 8 o'clock A. M.

Approved February 28th, 1912.

Recorded in Book No. 4 of Permits on Page
1060.

JOHN H. LEWIS,
State Engineer.

1 Map\$68.00."

COURT: What were you going to say?

A. I was going to say, your Honor, so that this
won't be misunderstood, when I talked with Mc-
Donald about getting this new power site, he wanted
us to give up the old power site when we were
through with it, as it was good land and he could
use it for agricultural purposes. So I agreed with
him that, if we took down the old power-house, I
would give him back the land; but if we decided that

it was necessary to keep this old power-house that I would pay him \$250 additional. Then when I finally gave him the balance, we decided to keep the power-house, I gave him \$300 on account of the expense we had put him to in tearing up his field and putting this pipe-line in, and getting ready for the pipe-line. So altogether he was paid \$550.

Q. That came out of the estate money?

A. Yes.

CROSS EXAMINATION.

Questions by Mr. Johns:

Were any other deeds executed by Alexander McDonald to The Cornucopia Mines Company of Oregon while you were receiver?

A. Mr. Johns, I don't remember any other deeds.

Mr. Callahan: Let me have that deed of February 20th. I will identify it and put it in.

A. I noticed it in that order, but I couldn't find it in the office; nor could we find it in the County Clerk's office at Baker City.

Mr. Johns: It was there.

A. I hardly remember this (referring to deed), but I am sure it is all right.

Mr. Callahan: We will just read this abstract in then.

Mr. Johns: No, just read it in the record the same as you did the other.

COURT: That is to whom?

A. This is to The Cornucopia Mines Company of Oregon. This covers the same ground.

Q. It covers the same ground?

A. You see, Mr. Johns, it is rather hard to tell six or eight months ahead just where you want to locate your power-house.

Q. Yes, I understand that, Mr. Betts.

A. But I wanted to tie up this ground as nearly as I knew how before someone else got hold of it.

Q. Yes, but for the purpose of this case we want this put into the record.

Mr. Callahan: Yes, I am going to put it in now. I just want to know if we are to put it all in.

Mr. Johns: No, just put it in the same way you did the others. Then the explanations and arguments can follow.

Mr. Callahan: All right.

COURT: Does this cover the same ground again?

A. Yes.

COURT: The same five acres?

A. Yes, sir.

COURT: You have three deeds?

A. Three deeds covering practically the same ground.

Mr. Callahan: Warranty deed Alexander McDonald to The Cornucopia Mines Company of Oregon, a corporation of Maine. Date of record, March 5th, 1912. Book 76 of Deeds, page 431. Consideration, \$250. Date of acknowledgment, February 20th, 1912. Conveys the following described parcel of real

estate, situate, lying and being in the County of Baker, State of Oregon, to-wit: Beginning at a point on the half-section line that is north 300 feet from the south line of Section; thence west 484 feet; thence north 450 feet; thence east 484 feet; thence south 450 feet to place of beginning, containing five acres, and being a part of the southeast quarter of the southwest quarter of Section 3, Township 7 S., R. 45 E., W. M.

COURT: Are those all the deeds now that are involved here?

A. Yes, sir.

Mr. Callahan: That is all I care about at the present time.

Cross examination continued.

Q. Now, Mr. Betts, did you ever make any subsequent filing with the State Engineer?

A. For additional water, do you mean?

Q. Or for any purpose?

A. Yes, sir.

Q. When?

A. I don't remember the date.

Q. And why did you make that filing?

A. To get more water. The trouble with the power situation there is that in the winter there is insufficient power, and we took up some water from a little stream on the west side of Pine Creek, and ran an eight-inch pipe line.

Q. Did you ever make an amended filing of this?

A. The original?

Q. Yes.

A. Yes, sir.

Q. When did you do that?

A. I don't remember the date.

Q. I call you attention to what purports to be a certified copy, from the office of the State Engineer at Salem, and ask you to examine and state if you know what it is.

A. Yes, sir.

Q. Look it over, and see if that is the amended filing you made.

A. Yes, sir.

Q. When did you make that filing?

A. The 27th day of December, 1913.

Q. Do you recognize that as correct?

A. Yes, sir.

Mr. Johns: We desire to offer that in evidence. There is a certificate attached to that whole record, Colonel. I don't want to offer that in evidence.

Mr. Callahan: No, I don't want to be technical about it. But I see the date is December 13th, 1913.

Mr. Johns: Well, that is right. That is what the record shows.

Mr. Callahan: I don't want to object to it, but what relevancy has it?

A. I don't see what it has to do with this, though.

Mr. Callahan: If it is relevant, I am perfectly willing it should go in. December 13th, 1913, a year afterwards.

COURT: I think it better go in.

Mr. Johns: It is not December 13th. It is December 27th.

Mr. Callahan: It is 1913, however. Well, put it in.

Mr. Johns: "Amendment on Water Application numbered Permit No. 1060. The point of diversion is amended to read 23.13 chains south, 48 degrees 38' east of the center of section line between sections 34 and 27, Township 6 South, Range 45 E., W. M., being within the northwest quarter of the northeast quarter of section 34, Township 6 South, Range 45 E., W. M., instead of 38 chains south, 66 degrees 30" west of the northeast corner of Section 3, Township 7 South, Range 45 E., W. M., being within the northwest quarter of the northeast quarter Section 3, Township 7 South, Range 45 E., W. M., as indicated by original permit.

State of Oregon,
County of Marion.—ss.

I hereby certify that the within was received by me on the 27th day of December, 1913, at 8 o'clock A. M., and was recorded in Miscellaneous Records, Volume 1, page 282. John H. Lewis, State Engineer, per Louisa Arthur, Deputy."

Q. You made that, too, did you?

A. Yes, sir.

Mr. Callahan: Whom was this application made by?

Mr. Johns: He made it himself as receiver.

A. Not as receiver, no, sir.

COURT: In what capacity?

A. Cornucopia Mines Company of New York.

COURT: What office do you hold in that company?

A. I am the manager.

Mr. Callahan: I want to call your attention to that.

A. This is not the same one.

Q. Have you the original amended application?

A. You mean the original of this?

Q. The original amended application. The one that I read to you?

A. No. Not with me, no, sir.

Mr. Johns: Your Honor, I called up the State Engineer, and asked to find out about how that application was made, and the office advised me it was returned to Mr. Betts—the original—and that this was all that is in the engineer's office. For that reason, I would ask the witness to produce the original.

Mr. Callahan: Is the original any different from this?

Mr. Johns: I don't know. I want to know by whom the application is signed. There is nothing in the record to show. The office of the State Engineer doesn't show.

A. Of this amendment, do you mean?

Q. Yes.

A. Where is the amendment now? I can take oath that that is the whole of that.

Q. I want to see the original.

A. I will be glad to send it down.

Mr. Callahan: Have you the original, Mr. Betts?

A. Yes.

Mr. Callahan: Where is it?

A. It is up in the safe, at the mine.

COURT: Well, that may be sent down here for comparison.

Mr. Callahan: Oh, yes, we will do that.

A. Yes. It is merely the same thing. If you would like to have me, I can explain why that was done. It is merely a matter of trying to conform to the laws of the State of Oregon.

COURT: Well, you got an additional water-right?

A. No, that is not an additional.

Q. This is an amendment of the permit No. 1060?

A. This doesn't take any more water. It merely changes the point of diversion.

Q. Do you know about what distance the change was made—that was made by that change?

A. About a mile—a mile in length.

Q. It gave you that much more power?

A. It gave no more power whatever.

Q. Then, why did you do it?

A. Under the laws, the old holders of water-rights can retain their old water-rights, but any subsequent applications come under the new law. The flume was held under the old law, and in making the application for this permit to carry the water on down in a pressure pipe, to get more head, we mentioned the point of diversion as the flume, which was the penstock for the pipe-line. The flume itself ran up the creek about a mile. Then about six

months ago I discovered that we held part of the system under the old water-right; that is, the flume part under the old water-right, and the other part, the pipe-line, under the new law. So I amended the point of diversion to read at the head of the flume instead of at the foot of the flume.

Q. Now, in executing any of these deeds, did you ever apply to the Court for an order?

A. No, sir.

Q. Why was this deed executed to The Cornucopia Mines Company of New York?

A. Merely to satisfy the State Engineer, to get that on the record.

Q. You did it to satisfy the State Engineer?

A. Yes, sir.

Q. That is the only reason?

A. That was the only reason.

Q. How does it happen that it was executed on the identical day that the deed was made by Colonel Wood to The Cornucopia Mines Company of New York?

A. I don't know that it was.

Mr. Callahan: Just wait a moment. I want to get that into the record, if it is correct.

A. I don't know that it was.

Q. If your deed was executed on the 20th of November, 1912, to The Cornucopia Mines Company of New York, and Colonel Wood deeded on the 20th of November, 1912, it was on the same day, was it not?

A. Yes, sir.

Q. Now, can you give any reason why it was done on those particular days?

A. Mr. Johns, I never knew the date of Colonel Wood's deed. I didn't know until now.

Q. And you made this deed, then, to The Cornucopia Mines Company of New York at the instance and request of the State Engineer?

A. Yes, sir.

Q. And you want this Court to believe that statement?

Mr. Callahan: Oh, well, now, that is all right.

Q. Now, Mr. Betts, after you made these water-filings and purchased this property from Mr. McDonald, what, if anything, was done with the filings? What did you do with them?

A. How do you mean?

Q. Well, did you make any improvements on them?

A. On the ground that I bought from McDonald?

Q. Yes.

A. Yes, sir.

Q. What did you do?

A. Built a power-house.

Q. When did you do that?

A. About September, 1912.

Q. And what is the value of those improvements? What did they cost?

A. About \$20,000.

Q. Power-house, you say?

A. Yes, sir.

Q. For the purpose of generating power?

A. Yes, sir.

Q. Is power generated there now?

A. Yes, sir.

Q. How long has it been generated?

A. Since a year ago last February.

Q. What is done with that power?

A. It is used to operate the mine and the mill.

Q. And when did you commence the construction of that power-house on that ground that you bought of McDonald?

A. In August or September, 1912.

COURT: That was after the master's deed was made for the sale of this property under mortgage?

A. Yes, sir, it was after the sale in Baker City.

Mr. Johns: No, I will bring that out. I might state for correction, your Honor, the master's deed to Colonel Wood was executed on the 20th of November, 1912.

COURT: To Colonel Wood?

Mr. Johns: Yes, sir.

COURT: And then his deed to the company was the same date?

Mr. Johns: Yes, sir.

Mr. Callahan: What date was that you gave, Mr. Johns, as the master's deed?

Mr. Johns: 20th of November, 1912.

Mr. Callahan: No.

Mr. Johns: Well, you produce the deed. I asked you to produce it. Now, you produce it.

COURT: This transaction, then, was after this deed was executed?

Mr. Johns: Before.

COURT: This is September, 1912?

A. Yes, sir.

Mr. Johns: Before. Now, you produce that deed.

Mr. Callahan: Which deed, Mr. Johns?

Mr. Johns: The deed from Ed. Rand to Colonel Wood.

Mr. Callahan: I haven't got it; never was any suggestion of it. I haven't got it. It is on the records here of Baker County. We may have it in our files—I don't know. It went to New York. I never had any occasion to have the original.

Mr. Johns: It is in this abstract here.

COURT: What I want to arrive at in this case is, that—this receiver has not made up a detailed account of his proceedings?

Mr. Callahan: Yes, your Honor, he has made up a detailed account.

COURT: Have you got that account here?

Mr. Callahan: It is in this case—the Hamilton Trust Company case.

COURT: Have you that?

Mr. Callahan: Mr. Betts has a copy of it, I take it.

A. It is merely the accounting, your Honor, month by month.

COURT: When was this filed?

A. I think it was filed sometime in the month of August, 1912.

Mr. Callahan: It was filed August 30th, 1912.

Q. Did you ever make an application to this Court for an order, or did you ever obtain an order

from this Court, to buy this property from McDonald?

A. No, sir.

Q. Did you ever make an application to this Court, or did you ever obtain an order from this Court, authorizing and directing you to make this application to the State Engineer for this water-right?

A. No, sir.

Q. Did you ever apply to this Court, or did you ever obtain an order from this Court, to construct that power-house on the McDonald land?

A. No, sir. That was not constructed by the receiver.

Q. It was done while you were receiver, wasn't it?

A. Yes. I was lessee at the same time.

COURT: You didn't construct that as lessee?

A. Yes, sir. That is, I constructed it while I had a lease on it.

Q. Do you mean to say, Mr. Betts, that there is any provision in your lease requiring you to construct a power-house upon this land, or the McDonald land, at a cost of \$20,000, to use for the benefit of the company?

A. Now, just wait a moment.

Mr. Johns: Just read the question.

A. I would like to state my position on that.

Mr. Callahan: Go on and state your position.

Mr. Johns: Just a moment. The witness can answer the question, and then make any explanation he wants to.

A. All right. (Question read.) No, there is no provision in the lease.

COURT: What explanation do you want to make?

A. I was going to say that the lease was given me primarily so that I could go ahead and carry on this work with greater expedition, and so that my hands would not be tied. All the men connected with the concern lived in New York, and they had no head office, and the lease was given to me more with that in view, so that I could go ahead with a free hand.

COURT: Then, you were operating in effect for the lessor?

A. For the company, yes.

COURT: Well, was it the New York company or the Oregon Company?

A. No, the New York company. It wasn't a company at that time at all. It was a group.

COURT: And in this case, although you were lessee of these mines by written contract, you were virtually the manager for the New York company?

A. Well, there was no—

COURT: I am asking you if that was the effect.

A. Yes, sir. There wasn't any company.

COURT: But you were the manager?

A. For men in the East.

COURT: I mean for a company that was to be organized?

A. Yes, sir.

COURT: That is, for the promoters of the company?

A. Yes, sir.

COURT: That was your real position?

A. Yes, sir.

Q. And that company was afterwards organized as The Cornucopia Mines Company of New York?

A. Yes, sir.

Q. Now, Mr. Betts, have you any funds in your possession as receiver?

A. No, sir.

COURT: You haven't made any report, have you, as to the funds paid into Court to comply with the sale?

Mr. Callahan: No, we are expecting Mr. Betts to make that report now. He hasn't any money. I supposed that was understood.

COURT: Well, there were certain funds to be paid into Court to pay the costs until the costs were satisfied, and until the claim against the estate which was prior to the mortgage was satisfied under the terms of the sale, and I think a report ought to be made of that, to inform the Court what has been done.

Mr. Callahan: Oh, yes, I will make that report; but Colonel Wood paid the costs and took care of that.

COURT: It ought to have gone through court proceedings, so the Court would know.

Mr. Callahan: I suppose he will make that report. He attended to that part of it. I know he paid it. I wasn't present.

COURT: Is the master's report filed, and does that contain that information?

Mr. Johns: No, sir, there is no such information in the master's report.

Mr. Callahan: I don't know that it does in detail, but someway it indicates that it is paid, or Colonel Wood has made the statement that he paid it in greenbacks. I know the clerk's costs were paid, because he returned me some funds—\$10 or \$12 or such a matter—of the surplus by his check. He did that very recently, within the last few months.

Mr. Johns: I don't want to testify, your Honor, but if it is necessary, I will go into that. The master's report shows there was not a single dollar of money paid over to the master from this sale; that the property was bid in for the bonds, and the bonds only; and the confirmation shows it, too.

COURT: That is the very reason why this Court is inclined to allow this procedure by which an execution may go against this property for a resale. The order of the Court provided, when the sale was made that the purchaser might pay in bonds, but the expenses and costs of the sale, and, by my rendition of the order of sale, the expenses and costs of the receivership should first be paid. The purchaser has not complied with that order. The purchaser has not paid the costs of the receivership, which I think to be legitimate costs, including this demand. And I think there ought to be a report made as to what was done in that respect, and what money was paid into Court, and why this other money was not paid.

Mr. Callahan: Well, that knowledge is within Colonel Wood, of course. He attended to that part of it.

COURT: I think the report ought to go to the full extent, so as to inform this Court just what was done; and if there has not been money paid into the Court for the purpose of taking care of the expenses of the receivership, it ought to be paid in now.

Mr. Callahan: That is true, but if the Court will remember this: The property was sold on the 29th day of June under the master's sale, and Mr. Betts, of course, received no compensation as receiver, because he received his compensation out of his lease, and not made out of the lease, he received \$350 as his commission in this report here.

COURT: It transpires now that he was acting for the promoters of this second company, the New York Company.

Mr. Callahan: That is true. He had a written lease of that character.

COURT: I suppose if this judgment had been against him as lessee, that fact would not have come to light at all.

Mr. Johns: Well, then, why doesn't he pay the judgment?

Mr. Callahan: The accident upon which judgment is recovered didn't occur until a month after that time, and there were no costs to pay other than were paid.

COURT: After which time?

Mr. Callahan: After the day of the sale, and the

time the money should be paid in under the decree of the Court.

Mr. Richardson: The decree of the Court was that he was to give possession after the confirmation. He could not give possession under the decree of the Court until after a deed had been executed.

COURT: I don't think that makes any difference, because the spirit and intent and purpose of the order was to protect the creditors of the estate until this matter was entirely settled, and that was the duty of the purchaser, to take care of those things.

Mr. Callahan: Well, I am sure, if the Court please, while it don't change it now, those things were cared for that were to be cared for at that time, that were known to have occurred.

COURT: There has been no report made to this Court. The Court has not been informed at all.

Q. Mr. Betts, while you were in charge of this property as receiver, what improvements, if any, did you make on that property?

A. Very few as receiver.

Q. Well, did you make any at all?

A. Not that I remember of now, no, sir.

Q. Didn't you construct a cyanide plant on it?

A. Not as receiver, no, sir.

Q. Didn't you do it otherwise.

A. I put in other money, yes, sir.

Q. How much did that cyanide plant cost?

A. About \$70,000 or \$80,000.

Q. And what other betterments and improve-

ments did you put on this property during the time that you were receiver?

A. Merely the power-house.

Q. And what other improvements?

A. None that I remember now as being of any magnitude.

Q. And when did you first commence the making of those improvements after you were appointed?

A. Not until in the spring, the actual work. The improvements were all contemplated, and the plans made for carrying on the work, in October, 1911.

Q. Now, you made a report to this Court about your expenditures and receipts, didn't you?

A. Yes, sir.

Q. Do you know about the amount of your expenditures that were made from January 1st, 1912, to the first of August, 1912?

A. The total amount, you mean?

Q. Yes.

A. I don't know offhand.

Q. Here is a recapitulation of it.

A. \$71,681.27.

Q. What was the amount of your receipts during that period?

A. \$781.81 less than that.

Q. You didn't execute any other deed to any other person or corporation as receiver, than the deed which you executed for the water-right of date November 20th, 1912, to The Cornucopia Mines Company of New York?

A. Not that I remember of, Mr. Johns.

Q. Well, if you had made such a deed, you would remember it, wouldn't you?

A. Not necessarily, no, sir.

Q. What consideration did you receive for making that deed to The Cornucopia Mines Company of New York?

A. The consideration, I think, in the deed was \$1.00 and other valuable consideration.

Q. Well, what consideration did you receive for making it?

COURT: What was the actual consideration?

A. That is all. There was no money—no other money paid; no money paid.

Q. Now, at that time you knew you were receiver, didn't you?

A. Yes, sir.

Q. And you knew that you were receiver appointed under decree of this Court, weren't you?

A. Yes, sir.

Q. Is there anything in that decree directing you to execute a deed to any property to The Cornucopia Mines Company of New York?

A. No, sir. But as I understood the matter, it was transferred by the mortgage—the mortgage covered that; but it was necessary, in order to perfect the title, to have a deed.

Q. Where did you get that information?

A. I got it from talking with the lawyers, and from the mortgage itself.

Q. What lawyer did you talk to?

A. Colonel Wood and Mr. Callahan. I don't

remember any specific instance where they told me that, but that has been my interpretation of it all the time, that this was for the benefit—

Q. Then, as a matter of fact, Mr. Betts, that deed was made by you as receiver to The Cornucopia Mines Company of New York at the suggestion and advice of your counsel, wasn't it?

A. You might say that; not specifically, though.

Q. Then when you state that you made that deed at the request of the State Engineer, you were wrong, weren't you?

A. No. I will tell you, Mr. Johns, until this matter was brought up, I had forgotten and overlooked the fact entirely that a deed had been executed to the new company. I had forgotten about it. It was more a matter of form. I know there was some talk of it at one time, there was some correspondence about it, but I thought the matter had dropped. Then when this came up, I remembered that the State Engineer required that it be in the form of a deed so they could record it.

Q. While you were receiver, appointed by this Court and under bonds, it never occurred to you that the Court had anything to do with what you did as receiver?

A. Yes; but not in that way. I never had very many instructions from the Court. When I first went in as receiver, I imagined that I would talk things over with the Court, but I later discovered that it seemed to be mere formality and I had to use my best judgment.

Q. Now, you say this money you paid to McDonald, you paid to him as receiver?

A. Yes, sir.

Q. Examine these vouchers. What do those vouchers show?

A. You mean the heading?

Q. Yes.

A. It is stamped "Robt. M. Betts, Lessee."

Q. That is wrong, is it?

A. No, sir; it is not wrong. The Court said I could act in both capacities, as lessee and receiver.

Q. Well, you say you paid this money as receiver?

A. I will show you right here, Mr. Johns—I took the lessee's money.

MR. JOHNS: We desire to offer these two in evidence.

COURT: Very well. Are those receipts part of the record of this case?

MR. JOHNS: Yes, they are vouchers, your Honor.

The vouchers are marked "Intervener's Ex. 1" and "Intervener's Ex. 2," and read as follows:

"Voucher No..... Check No..... Cornucopia, Oregon, Aug. 1, 1912. (Printed) The Cornucopia Mines Co., of Oregon. (Stamped) Robt. M. Betts, Lessee.

"To Alex. McDonald, of Cornucopia, Ore. For 5 acres of ground and right of way, \$300.00. Examined and..... Approved..... Found Correct.Accountant.Manager.

Received August 1, 1912, of the Cornucopia Mines Co., of Ore.

(Stamped) Robt. M. Betts, Lessee,
the sum of Three hundred and no/100 Dollars in full of above account.

“(Signed here) Alex. McDonald.”

INDORSED:

“Voucher No. 767. \$300.00.

(Printed) The Cornucopia Mines Co., of Oregon.

(Stamped over) Robt. M. Betts, Lessee, in account with Alex. McDonald for the month of July, 1912.

Distribution. Power Expense \$300.00.”

“Voucher No..... Check No..... Cornucopia, Ore., March 1, 1912.

(Printed) The Cornucopia Mines Co., of Oregon.

(Stamped over) Robt. M. Betts, Lessee.

To Alex. McDonald of Cornucopia, Ore.

Payment in full for 5 acres as power site \$250.00.

Duplicate.

Approved:

Manager.

Received Feb. 20, 1912, of (Printed) The Cornucopia Mines Co., of Oregon, (Stamped over) Robt. M. Betts, Lessee, the sum of Two Hundred Fifty and no/100 Dollars in full of above account.

“(Sign here).....”

INDORSED:

“Voucher No. 605. \$250.00.

(Printed) The Cornucopia Mines Co., of Oregon

(Stamped over) Robt. M. Betts, Lessee.

In account with Alex. McDonald,

For the Month of Feb., 1912.

Distribution—Power Expense. \$250.00.”

A. You seem to have the impression that we are trying to do something underhanded. I would like to say to you that we are not. Everything has been open and aboveboard as far as possible.

Q. Well, Mr. Betts, we simply want to get these facts in the record, and then we will argue the case by and by.

A. Well, I would like to show right now that they were carried as one and the same account. When the receivership started \$1224.90 was the balance I had in the bank, and I transferred that to “Robert M. Betts, Receiver,” and carried it on through the months, until at the end there was a deficit; and because of that deficit, I gave the Bishers \$600 of money out of the other fund, because this fund was short.

COURT: You say you gave them \$600?

A. I gave them \$600.

COURT: On what account?

A. To help Johnny in the hospital.

COURT: After he was hurt?

A. After he was hurt; yes, sir.

COURT: To apply on this judgment?

A. No, before there was any—there wasn't a thought of a suit. They always claimed that it was

his own fault, and there was no suggestion of a suit—nothing like that; and the matter was considered closed. And along in October Mrs. Bisher came up to the mine, and she said, “Now, you have said that you would help me in any way you could, and,” she said, “the time has come. John (her husband) has come to Portland—”

COURT: I think there was some testimony on that at the trial.

A. “The lawyers want Johnny to bring suit, and,” she said, “I don’t want them to bring suit, because, first, I feel it is not fair to you, and, second, I don’t think we can get any money.”

MR. JOHNS: Your Honor, I don’t think—

COURT: It is not necessary to go into that.

MR. CALLAHAN: None of this testimony was put in as a defense in that case.

A. No. As receiver this report was all filed, and I supposed the matter was all cleared up, your Honor, before any suit was brought. And I told Mrs. Bisher what I would do, and she broke down and cried, and said that was more than she could expect, and she would telegraph John. And the next I knew I was served with papers in the suit.

MR. JONES: Your Honor, I move to strike out all of that statement as immaterial. It has nothing to do with this case.

A. I would like to have things thoroughly understood here. It seems as if I am under fire here as doing something.

MR. JOHNS: It is a matter of the Court’s permission, I suppose. The only trouble is Mrs. Bisher

is not here. We are not permitted to go into our side of it. That is all. It is *ex parte*.

MR. RICHARDSON: If your Honor is not going to strike that out, I was just going to ask the witness one or two questions about this advance.

COURT: I think you better do that through Mr. Johns. With so many people inquiring here, we will get this record mixed up.

MR. JOHNS: Your Honor, the view I take of the matter is that it is wholly immaterial, and while we have our side of the statements made by the witness, we don't care to go into it.

Q. During the time you have been receiver, Mr. Betts, you have been receiving a salary of \$350 a month?

A. As lessee, yes. It came out of this account.

Q. You have been paying yourself as lessee a salary of \$350 a month during the time you were receiver?

A. Yes, sir. That was understood, I think, because I was to receive no compensation as receiver.

Q. Did you ever apply to the Court for an order for that?

A. It was in the original order that I was to receive no compensation as receiver.

Q. Well, did you ever apply to the Court for an order fixing your compensation that you were to have from any one?

A. Why, no. I didn't think that was in the Court's jurisdiction—that was all. I had been receiving that right along.

Q. You thought the Court had nothing to do with that?

A. Why, no. I had been receiving that before the receiver was ever thought of.

Q. With whom did you have this understanding that you were to have \$350 a month?

A. Benjamin B. Lawrence, of New York.

Q. Who is he?

A. He is a mining engineer.

Q. What relation does he sustain to the Cornucopia Mines Company of New York?

A. He is consulting engineer of the company to-day.

Q. One of the stockholders?

A. Yes, sir.

Q. An officer in the company?

A. I think he is vice-president.

COURT: Who is the manager of this company?

A. I am.

COURT: You are the manager?

A. Yes.

COURT: With authority to do all things necessary to the operation of the mine?

A. Yes, sir. That is, except where it requires a resolution of the board; that is, in making deeds and things like that.

COURT: Yes, I understand.

Q. When did you first enter into the employ of these people under the arrangement that you have been testifying about?

A. In November, 1910.

Q. You have been working for the same people all the time ever since?

A. Yes, sir. Would you like to have this cleared up a little more?

Q. I will clear it up. When did you cease your employment for the Cornucopia Mines Company of Oregon?

A. When the receivership started.

Q. And when did you enter on your employment for the Cornucopia Mines Company of New York?

A. When it was formed.

Q. When was that?

A. November, 1912. Well, that is at the termination of the lease. The lease was not renewed after that. All this construction work, etc., had been completed, and things were settled down in a quiet state.

Q. Who completed this construction?

A. I completed it.

Q. I know, but for whom were you acting during that period?

A. For these men in New York.

Q. Well, what men?

A. Well, I didn't know the names of but two of the men connected with it. It was a syndicate of men that the new company was formed of.

Q. What I am getting at, was this syndicate for whom you claimed to be acting while you were receiver and during the time you were making these improvements—was that syndicate the same people that now constitute the Cornucopia Mines Company of New York?

A. No, sir.

Q. Well, who was it?

A. Yes and no. There are a lot of new men in it now. That was one thing that I thought I would clear up if possible.

Q. Well, I want you to clear it up, Mr. Betts. I want to be fair with you.

A. The Searles estate owned or controlled the stock, I think, of the old company, and some of the bonds; and the Court ordered this estate to be closed out.

COURT: Back there?

A. Back there. And the administrator came to Mr. Lawrence, and said, "This has to be sold at a certain date," and asked him if he would buy it in, and Mr. Lawrence said he would. Now, after they bought in this stock which was held by the Searles estate, they were unable to get some of the rest of the stock, and this Laubheimer judgment came up, and they bought the bonds. It was easier to buy the bonds than the stock. And Mr. Laubheimer had a judgment against the company for some \$12,000.

Q. The Cornucopia Mines Company of Oregon?

A. Of Oregon. So they decided to foreclose these bonds, and clear up all the litigation and these other claims, and have the property in good shape.

COURT: Was there other outstanding indebtedness against the Cornucopia Mines Company of Oregon, except the bonded indebtedness?

A. Only the Laubheimer judgment. I think that was all.

COURT: It was your intention, then, to clear up all matters against this estate?

A. Yes; try to make it at least minable. It had always been in litigation before.

COURT: It was also your intention to take care of the receivership charges in closing out this business?

A. Now, of that I had no knowledge, you see. That is, how do you mean?

COURT: It was also the intention of the promoters, when the receiver was appointed, to take care of the costs and charges and expenses of closing out the receivership?

A. Yes, sir.

Q. So as to get a clear mine?

A. Yes. And so they advanced money. Now, who these friends of Mr. Lawrence's were, I do not know. I had known Mr. Lawrence for years, and he had confidence enough in me to say, "Here, you can handle this better to have a lease on it, because we have no organization back there, and on account of the short summer seasons this work might have to be rushed, and we would prefer to give you a lease on it, so that you will not be bothered with"—

Q. Getting orders from headquarters?

A. "Getting orders from headquarters." And of course just at that time when the lease was made, we hadn't altogether decided to build the mill. Our idea was to get the mine so as to justify the expenditure—first to develop the mine so as to justify the expenditure; and as month by month we were able to make the mine show up enough ore, we finally decided to build this mill. And that was about the time, almost coincident with the time the re-

ceiver was appointed. And while the lease does not specify anything about my compensation, Mr. Lawrence said, "If we don't get this mill completed in time to go ahead and do the work—go ahead and mill so that you will receive as much from the profits of the lease, why, we will compensate you for it. And so I continued to draw my salary; that is, draw the same amount as I had received as manager.

Q. Now, Mr. Betts, on what particular piece of land is this power-site constructed? Just point out in the deed there.

A. It is constructed on the ground bought from McDonald.

Q. I know, but ground described in which deed?

COURT: The first, second or third deed?

A. The third deed, the deed of August 1st. That was determined by the final survey.

Q. Executed of date August 1st?

A. Yes.

Q. Upon what lands is the cyanide plant constructed?

A. On the old ground, the ground covered by the mortgage.

Q. Can you point out the land, Mr. Betts? Would you know?

A. No, it is some place—the name of the claim is the Phoenix claim.

Q. And that cyanide plant, you say, cost about \$70,000?

A. Yes, sir.

Q. It is there now, is it?

A. Yes, sir.

Q. Now, this power-plant that was constructed on this land, where did you get the machinery for that?

A. In San Francisco—in San Francisco and New York.

Q. And it was shipped up and put upon that ground during this time?

A. Well, it wasn't erected until the following January, because the machinery was late.

Q. What January?

A. January, 1913.

Q. Now, when this water-filing, or permit rather, was obtained from the office of the State Engineer, was there a ditch or flume-line then extended?

A. Yes, it was all built. The flume had been there for years.

Q. And you rebuilt it?

A. No. You see, Mr. Johns, the flume came about a mile down the creek, which gave about 300 feet fall. But that was not sufficient, so at the end of the pipe-line, where the old power-house was situated, we put in a "Y," and carried this water under pressure farther down the creek, until we got about a 500-foot fall, which increased the pressure, thereby increasing the horse-power.

Q. You took it down by pipe instead of flume?

A. Took it down by pipe, yes, sir.

Q. And how much pipe was put in there?

A. In the neighborhood of 3,500 feet.

Q. And what did that cost?

A. About \$10,000 delivered.

Mr. Johns: I think, your Honor, that is all.

Mr. Callahan: I want to read into the record, from the decree of this Court in the foreclosure case of The Hamilton Trust Company, complainant, v. The Cornucopia Mines Company of Oregon, et al., on page 15 of that decree, as follows:

“At the time of the execution of said deed the said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said, The Cornucopia Mines Company, a corporation, or any interest therein, vested or standing in the name of the receiver, or to which said receiver has acquired any right, title or interest.

“That upon the execution and delivery of the conveyance or conveyances aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into the possession of all of the said mortgaged premises or property so conveyed to him or them, and that any of the parties to this cause, their agents, officers and employees, who may be in possession of the said mortgaged premises or property, or any part of the same, and any person who has since the commencement of this suit come into the possession of the same, or any part thereof, shall forthwith surrender possession thereof, to such purchaser or purchasers, his or their representatives or assigns.”

REDIRECT EXAMINATION.

Questions by Mr. Callahan:

Now, just one more question, Mr. Betts, to make it clear to the Court. You have testified here in relation to certain permanent improvements that were made at various times, which were contemplated before the receivership, some carried on during the receivership and some portions carried on after the receivership?

A. Yes.

Q. Now, tell the Court where you got the money to make those expenditures, and to pay for those improvements, and the machinery specifically.

A. It was sent me from Mr. Lawrence's office, and aggregated up till about the first of September some \$83,000.

COURT: What year?

A. 1912.

COURT: That was sent to you prior to the receivership and during the receivership?

A. Yes, sir, prior to the receivership and during the receivership, and was deposited in my name as lessee, in Spokane, Washington, in the Spokane Bank.

Q. You have the checks there?

A. Not all of them. I have part of them.

Q. This fund that was checked out for this specific purpose was deposited in the Spokane Bank?

A. Yes.

Q. Where were you in the habit of carrying your account under the receivership and as lessee of the mine?

A. In the Citizens Bank, of Baker, Oregon. I did my best, your Honor, to keep things separate and straight.

COURT: I have no doubt of that.

Mr. Johns: Now, I want to see if we can agree upon the date that this deed was made.

A. I thought the matter had been merely cleared up, and that my receivership was awaiting its course on the docket to be discharged.

COURT: Well, it would have been discharged, had it not been for this judgment against you as receiver.

A. If that deed was the 7th of October, it was prior to bringing the suit.

Mr. Johns: Can this deed go in the record?

Mr. Callahan: I don't see why it can't. The only question about it, Mr. Johns,—I don't object, excepting it may complicate the record, because it is in the master's report, all of this that is done. It is already in.

Mr. Johns: No, I don't think so. That is the reason I want it in.

Mr. Callahan: Read it in as a matter of testimony.

Mr. Johns: All right. It appears from the record that Ed. Rand, Special Master in this suit, executed his deed to C. E. S. Wood as trustee, of the property mentioned and described in the trustee's mortgage, of date October 7, 1912; that the deed was

recorded on the 10th of October, 1912, in Book 77 Records of Deeds of Baker County, Oregon, on page 384 et seq.

Recess until 2 P. M.

ROBERT M. BETTS resumes the stand.

Examination by the Court.

Q. Mr. Betts, I want to ask you another question. Have you any other property in your possession, or has any other property come into your possession, aside from what has been transferred by these deeds in question, first, by the deed under the foreclosure sale, and the deed you have given as receiver to the New York Company?

A. No, sir. No, nothing. You mean real estate? Have I bought any property?

Q. Well, has any property come into your hands as receiver?

A. No.

Q. That has not been disposed of?

A. No, sir.

Q. I understood counsel to say, the other day, when you were not here—that there were some small items of property, or items of small value.

Mr. Callahan: Mining claims.

COURT: Such as mining claims, situated in different locations.

A. Oh, you mean claims that were not covered by the mortgage and not specified in the mortgage?

Q. Yes.

A. Why, there are some claims, or there were; but they were unpatented claims, and they were of

little or no value, and they were allowed to lapse; that is, the assessment work was not done on them.

Q. Do you mean that you, as receiver, abandoned those claims?

A. I didn't do the work on them.

Q. Well, by not doing the work, that would mean an abandonment?

A. An abandonment, yes, sir.

Q. So you don't claim any further right in those claims?

A. No. Some of them have been relocated, and some of them have not.

Q. Been relocated by other persons?

A. By other persons, and some of them have not.

Q. They are of minor value, any of them?

A. Yes, they are of minor value.

Mr. Callahan: If the Court please, in that connection, to make the situation clear: I had a list of those claims he mentioned at that time. They were not included in the receivership; it had nothing to do with them. They were separate and distinct. He never exercised any receivership over them. They belonged to The Cornucopia Mines Company of Oregon, but they were not included in the mortgage.

COURT: Not included in the receivership?

Mr. Callahan: In the receivership, or the mortgage.

A. You see, they just lay there, and there was nothing done with them. They were not covered by

the mortgage, and there was nothing ever done with them.

COURT: You have no intention of claiming those?

A. No; not unless something should develop that we might consider that they were worth some value—something like that.

Mr. Callahan: Mr. Betts, that would be true of any other adjacent Government land there, you would locate it if you thought there was any value in it?

A. Yes. For instance, we perhaps might have wanted to run a telephone line, power line, or something. In order to get the ground, we might locate the ground, you see, regardless of the value as a mining claim.

COURT: I see. That is all.

Excused.

Mr. Johns: Your Honor. I don't know what you may want to do with that decree, but your Honor will note that the amount of costs in Bisher against the Receiver is left blank there, and I will ask leave to fill that in from the Court records below.

COURT: Very well.

Mr. Johns: And your Honor will also note that that provides there for publication of six weeks. I have been thinking that matter over, and I don't know of any reason why it should be published for six weeks. I think four weeks is sufficient. Your Honor will also note that the decree there is based upon the records on file. I want an insertion there,

“and upon testimony taken in open Court,” so as to show that way.

COURT: Very well. Four weeks will be sufficient, I suppose.

Mr. Callahan: Oh, it isn't important to us at all. However, we are going to suggest that we will file a report as to the payment of the costs of this Court, and the Master, that he received his pay under that provision of the decree. We will make that showing.

Mr. Johns: That is all right.

Mr. Callahan: If you Honor please, may we note an exception?

COURT: Yes, you may note an exception. That is an exception to the Court signing the order?

Mr. Callahan: Yes. The Court's order of sale, etc.

COURT: You may be allowed your exception.

In the above entitled cause, it is hereby stipulated by the solicitors for Appellant and Appellee, that the Clerk, in having the transcript printed on Appeal herein, set forth the testimony in full, and not in narrative form, except the last eleven lines on the type-written page 30 of the transcript of testimony herein, and the first two lines on page 31, thereof; and that the Court may approve the foregoing statement of testimony, if the same to the

Court shall seem proper, in accordance with this stipulation.

EMMETT CALLAHAN,
one of Appellants Attorneys.

CHARLES A. JOHNS,
of Attorney for Appellee.

The foregoing statement of the testimony on appeal is hereby approved and allowed, this 30th day of September, 1914.

CHAS. E. WOLVERTON,
Judge.

Filed October 2nd, 1914.

G. H. MARSH,
Clerk.

And, to-wit, on the 16th day of September, 1914, there was duly filed in said Court, and cause, a Praeipie for Transcript, in words and figures as follows, to-wit:

PRAECIPE FOR TRANSCRIPT.

Memorandum for Clerk to Prepare Record on Appeal.

Included in the Printed Record on Appeal the following papers and records:

Complaint in full.

Subpoenas ad Respondendum.

Motion filed in case December 7th, 1911.

U. S. Marshal's return of service of Subpoenas.

Court Order filed December 7th, 1911.

Affidavit filed December 7th, 1911.

Order for service outside of District, filed December 12th, 1911.

Petition for service outside District, filed December 12th, 1911.

Order appointing receiver, filed December 21st, 1911.

U. S. Marshal's return, filed December 23rd, 1911.

Receiver's bond.

Cornucopia Mines Company's demurrer, filed January 22nd, 1912.

Order continuing hearing on demurrer.

Order continuing hearing on demurrer to February 19th, 1912. Also order overruling demurer on Monday, February 19th, 1912.

Decree pro confesso, March 2, 1912.

Decree of foreclosure favor of complainant, April 30th, 1912; omit from this decree the description of the property, and insert in the printed record, "For description of property foreclosed by this decree, see Bill of Complaint, pages to"

Special master report of sale; omit from printed record the description herein, and refer to: "Description of property sold by Master herein, see pages of Complainant's Bill, where property sold is fully described.

Affidavit of publisher publishing notice of sale, omit description of property described in published notice of sale; for description of property described

in notice of sale, see Bill of Complaint, pages
to

Affidavit of notice of sale in New York paper,
omit description as in last paragraph, and refer to
same in Bill of Complaint as above.

Motion to confirm sale to C. E. Wood.

Confirmation of sale, omit description of prop-
erty, and refer to Bill of Complaint as above.

Receiver's report.

Affidavit in re to appointment of guardian.

Order appointing guardian.

Application to intervene.

Order to show cause in intervention.

Petition in intervention.

Motion filed to dismiss petition in intervention,
May 29th, 1913.

Order allowing petitioner Bisher to intervene.

Answer to order to show cause in intervention.

Motion in re to intervention.

Motion of intervener, filed December 12th, 1913.

Order sustaining motion in intervention, Decem-
ber 22nd, 1913.

Motion filed June 8th, 1914.

Order filed June 30th, 1914, requiring receiver
to report.

Notice of motion, June 8th, 1914.

Decree in favor of intervener, July 10th, 1914.

And all other papers filed in the foregoing case
not bound in the judgment roll, or since the judg-
ment roll was made up.

A copy of the testimony taken herein in narra-
tive form.

Omit the description of property set out in the decree of July 10th, 1914, commencing at paragraph 1 marked thus V page 9 of said decree, to and including paragraph 33, page 16, of said decree.

Assignments of error; citation on appeal, app. bonds, etc.

C. E. S. Wood, report.

WOOD, MONTAGUE & HUNT, and
EMMETT CALLAHAN,
Attorneys for Appellant.

Due service of the within Memo for record on Appeal by certified copy as prescribed by law, is hereby admitted at Portland, Oregon, September 16th, 1914.

BOOTHE & RICHARDSON,
Attorneys for Appellee.

Filed September 16th, 1914.

G. H. MARSH,
Clerk.

And, to-wit, on the 30th day of June, 1914, there was duly FILED in said Court and cause a plea and objections to the jurisdiction of the Court, in words and figures as follows, to-wit:

PLEA TO JURISDICTION.

Now comes Hamilton Trust Company, complainant in the above entitled suit in equity, and Robert M. Betts, as Receiver, by Wood, Montague & Hunt, their attorneys, and the Cornucopia Mines Company of Oregon, by Emmett Callahan, its attorney, respondent, for the special purpose, and no other, until the questions herein raised are decided of objecting to the jurisdiction of this Court, by protestation, in not confessing or acknowledging all or any part of the matters or things set forth in the pleas of the intervenor, John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, by the pleas, pleading, motions and more especially the decree subjecting property to the Bisher lien, and authorizing and directing its sale as set forth in the decree asked by the intervenor herein and for cause of objection, protestation and demur thereto shows:

I.

That it appears from the intervenor's petition in intervention herein, and intervenor's motion thereon, that this Court has no jurisdiction to hear and determine the prayer and things petitioned for by said intervenor in his petition in intervention or motion thereon in equity; that this Court has no jurisdic-

tion to in any way determine or granting by order or decree the things prayed for in intervenor's petition in intervention, or to grant the decree and order filed by the intervenor herein in this suit on the 29th day of June, 1914; that this Court is wholly without jurisdiction herein and precluded from hearing of this suit in equity against or adverse to the Hamilton Trust Company, complainant herein, and Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, respondent, or against the Cornucopia Mines Company of Oregon, respondent.

II.

That this Court has no jurisdiction to make and determine by its decree herein any of the things or facts set forth and alleged in paragraph II of the decree prayed for by John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, intervenor; as the facts and things therein alleged are not in evidence or recorded in the record by testimony given in this said suit in equity or otherwise; that said facts set forth in said paragraph II, as aforesaid, do not appear upon the record in said suit in equity wherein said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, as intervenor, or at all.

III.

That the facts set forth in paragraph III of said decree subjecting the property foreclosed in the foregoing suit in equity, and subjecting the same to the lien of said Bisher, is no part of said record in said suit in equity as aforesaid.

IV.

That the facts set forth in said decree as aforesaid in paragraph IV thereof, are no part of the record in said suit in equity to foreclose the mortgaged premises described in complainant's bill of complaint therein; that the facts set forth in said paragraph IV as aforesaid in said decree as prayed for by intervenor, are no part of the record in said suit in equity heretofore referred to.

VI.

That the facts set forth in the V paragraph of the foregoing mentioned decree do not appear in said foreclosure suit as aforesaid upon the record thereof by way of testimony, or evidence, or otherwise, or at all, in said foreclosure suit as aforesaid.

V.

That the facts and things set forth and contained in paragraph VI of the foregoing and afore mentioned decree prayed for by the intervenor John L. Bisher herein, are no part of the record in said foregoing mentioned foreclosure suit in equity by way of oral or written testimony, or embodied in the record in any way in said suit.

VII.

That said petition in intervention by said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, as intervenor, and said decree as prayed for and filed herein on the 29th day of June, 1914, is wholly without equity against the Hamilton Trust

Company, complainant, Robert M. Betts, Receiver of Cornucopia Mines Company of Oregon, and the Cornucopia Mines Company of Oregon, respondents.

VIII.

That this Court has no jurisdiction at this time to hear or determine John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, to be granted equitable or other relief against the Hamilton Trust Company, complainant, or Robert M. Betts, Receiver of Cornucopia Mines Company of Oregon, or the Cornucopia Mines Company of Oregon, respondents, for the reason that said John L. Bisher, Jr., by his guardian ad litem, as intervenor, has filed no bill in equity or complaint wherein for any reason or cause he alleges the decree, order of sale, and sale of the property under said decree, order of sale, and sale of the property set forth in the suit and bill of the Hamilton Trust Company, complainant, against the Cornucopia Mines Company of Oregon, et al, respondents, was ever filed in this Court for said purpose or relief to said John L. Bisher, Jr., by his guardian ad litem, as intervenor, or otherwise.

IX.

That this Court has no jurisdiction to hear and determine on the petition in intervention heretofore filed herein by John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, respondent, to determine by decree or otherwise, granting said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, a superior lien or right to the property heretofore

by decree of this Court, order of sale, and sale thereof, in the suit of the Hamilton Trust Company, complainant, vs. the Cornucopia Mines Company of Oregon, et. al., respondents; that such decree by this Court without jurisdiction so to make said decree would deprive the Hamilton Trust Company, complainant, Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, and the Cornucopia Mines Company of Oregon, of their property without due process of law, under the Constitution of the United States and the laws of the United States in such cases made and provided.

X.

That the Hamilton Trust Company, complaint, Robert M. Betts, Receiver of Cornucopia Mines Company of Oregon, and the Cornucopia Mines Company of Oregon, were never served with process or summons issued out of and under the seal of this Court in any suit or action for the purpose of procuring a decree against said foregoing named parties complainant and respondents.

WOOD, MONTAGUE & HUNT,
Attorneys for Complainant and Respondent.

I hereby certify that in my opinion the foregoing objections, protestations and pleading, are well founded in point of law.

WOOD, MONTAGUE & HUNT,
Attorneys for Complainant, Receiver and
Respondents.

Received, accepted by true copy hereof the foregoing objections and demurrer to Decree to create first and prior lien in favor of John L. Bisher, Jr., Intervenor, this 30th day of June, 1914.

CHARLES A. JOHNS,
Attorneys for Intervener.

Filed June 30, 1914. A. M. CANNON, Clerk.

And, to-wit, on the 17th day of July, 1914, there was duly FILED in said Court and cause, a Report and Accounting of Trustee, in words and figures as follows, to-wit:

REPORT OF TRUSTEE.

To the Honorable Charles E. Wolverton, United States District Judge:

Comes now C. E. S. Wood, one of the attorneys for the Hamilton Trust Company, complainant herein, and at the suggestion of the Court, informs the Court:

That he attended the sale held and conducted by Ed. Rand, a special Master duly appointed by this Court, under the decree of this Court dated the 30th day of April, 1912, wherein said special Master was ordered to sell the real and personal property described in said decree.

That said special Master of this Court after full compliance with the orders and directions of said decree of this Court made on the said 30th day of

April, 1912, offered said real and personal property described in said decree for sale on the 29th day of June, 1912, in front of the Court House in Baker City, Baker County, Oregon, to the highest bidder there at.

That at said sale as aforesaid, I, C. E. S. Wood, as Trustee, became the purchaser of said described real and personal property, for the sum of \$432,000.00, and delivered to said special Master of this Court the first mortgage bonds in the sum of \$300,000.00, and accrued interest on said bonds in the sum of \$136,000.00, as provided and decreed by this Court in its said decree of April 30, 1912, in the above entitled suit; and that in addition to the payment of the foregoing sums, I paid cash expenses of said sale of said property in full to date of sale; the costs of this suit and complainants' attorney's fees in full.

That on the date of said sale of said property, the 29th day of June, 1912, there were no expenses of the receivership of said property nor taxes nor other expenses incurred in the care, custody or receivership of the property sold as aforesaid to me as Trustee at the date of sale thereof, to-wit, the 29th day of June, 1912.

C. E. S. WOOD,
Trustee.

United States of America,
District of Oregon.—ss.

I, C. E. S. Wood, first being duly sworn, say that
the foregoing report is true.

C. E. S. WOOD.

Sworn and subscribed to before me this 17th day
of July, 1914.

(Seal.)

ERSKINE WOOD,
Notary Public for Oregon.

Due service of the within Bid and Accounting of
Trustee by certified copy, as prescribed by law, is
hereby admitted at Portland, Oregon, July 17, 1914.

CHARLES A. JOHNS,
Attorney for Intervener.

Filed July 17, 1914. A. M. CANNON, Clerk.

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in which The Hamilton Trust Company is plaintiff and appellant, and The Cornucopia Mines Company of Oregon, is defendant and appellant, and John L. Bisher, Jr., by John L. Bisher, his guardian *ad litem*, is intervener and appellee, in accordance with the law and the rules of this Court, and in accordance with the praecipe of the appellants filed in said cause, and that the said record is a full, true and correct transcript of the record and proceedings had in said Court, in accordance with said praecipe, as the same appears of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing record is \$. for clerk's fees for preparing the transcript of record and \$. for printing said record, and that same has been paid by said appellants.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Portland, in said District, on the day of, 1914.

.

Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and

CORNUCOPIA MINES COMPANY OF
OREGON, et al.,
Respondents and Appellants,
VS.

JOHN L. BISHER, JR., by John L. Bisher, his
Guardian *ad litem*,
Intervener and Appellee.

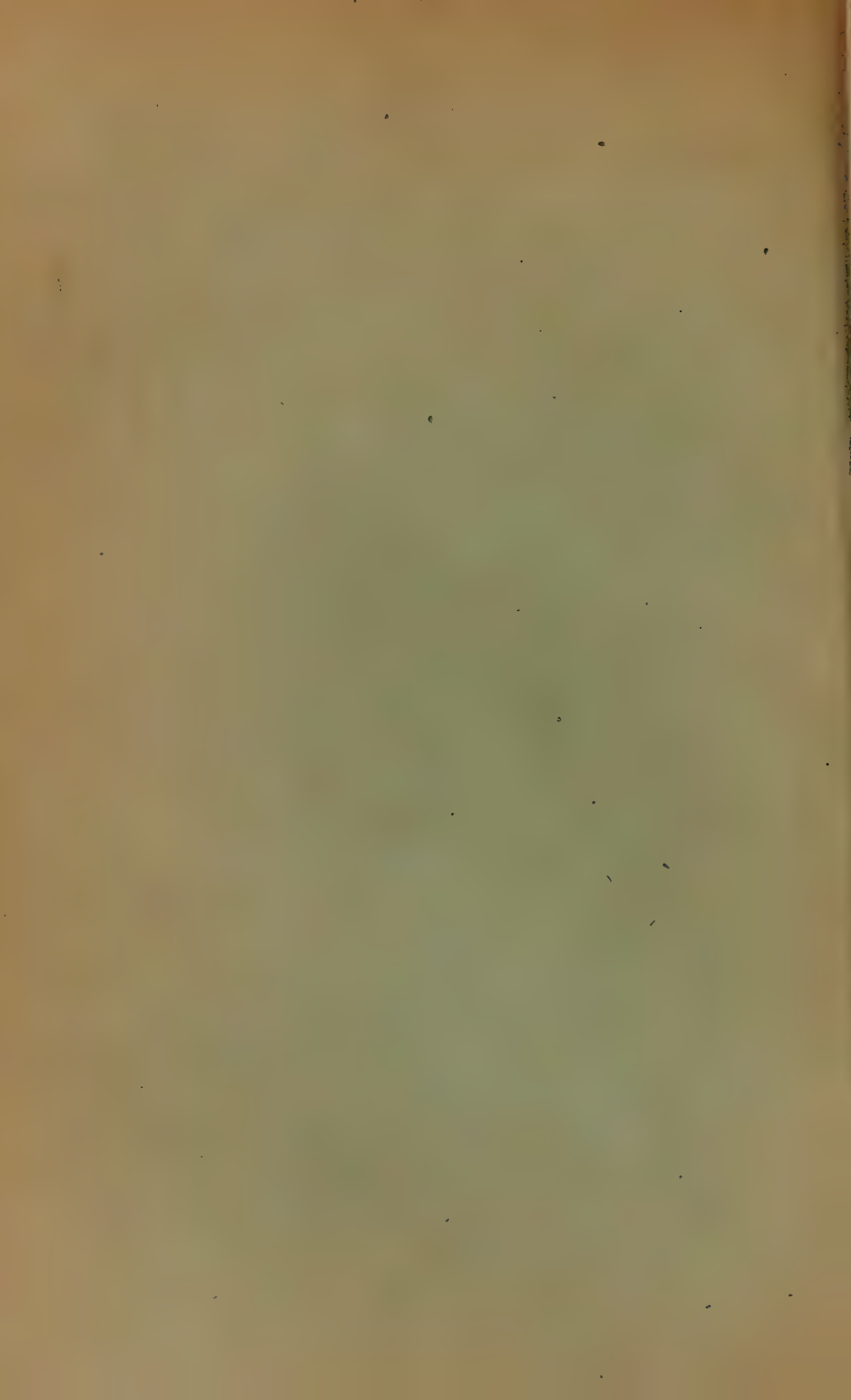
Brief on Behalf of Appellants.

Emmett Callahan and
Wood, Montague & Hunt,
Attorneys for Appellants.

Filed

JAN 11 1915

F. D. Monckton,
Clerk.



No. _____

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and

CORNUCOPIA MINES COMPANY OF
OREGON, et al.,
Respondents and Appellants,
vs.

JOHN L. BISHER, JR., by John L. Bisher, his
Guardian *ad litem*,
Intervener and Appellee.

Brief on Behalf of Appellants.

Emmett Callahan and
Wood, Montague & Hunt,
Attorneys for Appellants.

In the United States Circuit Court of Appeals.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and

CORNUCOPIA MINES COMPANY OF
OREGON, et al.,
Respondents and Appellants,
vs.

JOHN L. BISHER, JR., by John L. Bisher, his
Guardian *ad litem*,
Intervener and Appellee.

STATEMENT OF THE CASE.

On April, 1st, 1905, the Cornucopia Mines Company of Oregon, issued \$300,000 in first mortgage bonds with interest at 6% per annum, interest payable semi-annually; to secure the bonds it made and executed a first mortgage upon the mines and property fully described in the complaint herein, and named the Hamilton Trust Company of Brooklyn, New York, as the trustee in said mortgage bonds.

The bonds were sold on the open market and purchased by various buyers to the full amount issued at par value; when the bonds become due and payable by their terms (April 1st, 1911) the Mines Company, made default in the payment of the principal sum (\$300,000.00) and defaulted in interest payments on the bonds in the sum of \$99,000.00.

On December 5th, 1911, the Hamilton Trust Company, Trustee, filed its bill in foreclosure to fore-

close the mortgage bonds against the Mines Company and other Respondents, in its suit; on December 5th, 1911, personal service was had on the Mines Company; the other respondents were served personally on the 5th and 14th days of December, 1911, respectively.

Complainant on the 7th day of December, 1911, moved the Court for the appointment of a Receiver; thereupon the Court made its order to show cause why a Receiver should not be appointed on the 21st day of December, 1911; there being no objection to the appointment of a Receiver, the Court appointed Robert M. Betts receiver for the real and personal property of the Mines Company, described in Complainants' Bill, on said 21st day of December, 1911; on January 2nd, 1912, said Betts qualified as such receiver.

The Mines Company on January 22nd, 1912, filed its demurrer to the Bill of Complaint, which demurrer was by the Court on the 5th day of January, 1912, overruled; the Mines Company refused to plead further, whereupon the Court decreed that the Bill be taken as confessed against the Mines Company, and that a decree of foreclosure be entered against the Mines Company, as a first Mortgage lien against the property of the Mines Company in favor of Complainant, and for all equitable relief as prayed for in the Bill.

On April 30th, 1912, a final decree was made and entered in favor of the Hamilton Trust Company, complainant, against the Mines Company and the

other defendants foreclosing the property of the mines as a first lien thereon, and ordering that same be sold by a Special Master on the 29th day of June, 1912.

The decree provided that the Hamilton Trust Company have and recover the sum of \$422,940.00 and costs against the Mines Company; and that the purchaser at the sale of the mortgaged property be entitled to use and apply in making payment of the purchase price any of the outstanding bonds secured by the mortgage set forth in the decree, and that a sufficient amount in cash be paid to cover cost of sale, expenses of receivership, attorneys' fees, taxes, etc.

The sale took place as provided by the decree on the 29th day of June, 1912, and the mortgaged premises were sold by the Master to C. E. S. Wood, as trustee for the bondholders, for the sum of \$432,000; that Wood as such trustee delivered over to the Master making the said sale the first mortgage bonds described in the complaint, amounting to the sums of \$300,000 principal and \$136,000 interest, or the total sum of \$436,000; that the Master making the sale received the said bonds and interest coupons attached to same as the full purchase price bid by Wood as Trustee, and as liquidation in full of the mortgage indebtedness of the Mines Company, and issued a certificate of sale for the mortgaged property to Wood as Trustee on the 29th day of June, 1912, the day of sale.

That the Master cancelled the mortgage bonds in the sum of \$300,000, and \$136,000 interest coupons thereon, and delivered the same to the Mines Company as provided by the order and decree of the Court.

That on the 5th day of July, 1912, the Special Master made his report of the sale to the Court making the decree.

That on the 6th day of August, 1912, complainant made and filed its motion for confirmation of sale; that thereupon on the foregoing date the Court confirmed and approved the sale.

That on the 30th day of August, 1912 Robert M. Betts filed his final report as LESSEE and RECEIVER of the Cornucopia Mines Company of Oregon, showing a deficit of \$781.81 in the operation of the mines during his leaseship and receivership.

That on the 10th day of October, 1912, John L. Bisher, Jr., filed his affidavit herein praying the Court to appoint John L. Bisher, Sr., as his guardian ad litem.

That thereupon the Court appointed John L. Bisher, Sr., as such guardian.

That on the 7th day of October, 1912, Ed. Rand, as Special Master, after confirmation of sale as made by him as such to C. E. S. Wood, Trustee, made a deed of conveyance of all the property described in complainants Bill and Notice of Sale to C. E. S. Wood, Trustee; that thereafter on October 8th, 1912,

C. E. S. Wood, Trustee, made a deed of conveyance of all the foregoing described property to the CORNUCOPIA MINES COMPANY OF NEW YORK, a corporation.

That on October 12th, 1912, John L. Bisher, Sr., for his minor son (the Intervener herein), commenced an action for damages to said minor son against Robert M. Betts, as Receiver of Cornucopia Mines Company of Oregon, in the above entitled Court; that said cause was tried in said Court, and on the 11th day of April, 1913, and a judgment was obtained by the Intervener herein against Betts as Receiver of the Mines Company of Oregon, for the sum of \$12,500.

That afterwards on the 14th day of May, 1913, John L. Bisher, Jr., by his Guardian, filed a petition in intervention herein; that afterwards on the 29th day of May, 1913, the Mines Company of Oregon filed its special motion to dismiss the petition in Intervention.

That on the 29th day of May, 1913, the motion of the Mines Company to dismiss the petition in intervention was by the Court denied.

On June 20th, 1913, the Mines Company filed its answer to show cause in intervention; that thereafter on December 12th, 1913, John L. Bisher, Jr., by his Guardian, moved the Court to strike out the Mines Company's answer; thereafter on the 22nd day of December, 1913, the Court held the answer of the Mines Company, and the Hamilton Trust Com-

panys' insufficient to show cause: To the making and granting of such order and holding the Hamilton Trust Company, and Robert M. Betts, Receiver for the Mines Company, then and there duly excepted, which exception was duly allowed by the Court.

On the 8th day of June, 1914, John L. Bisher, Jr., by his Guardian, filed a motion to vacate and set aside the sale of the property, described in the Bill of Complaint, to C. E. S. Wood, Trustee, and to have the property resold and the proceeds of the sale applied, first, to the expenses of the sale of said property; and second, to expenses of the receivership, including the amount of the judgment rendered on April 11th, 1913, in the U. S. District Court in favor of John L. Bisher, Jr., by his Guardian, against Robert M. Betts, as receiver of Cornucopia Mines Company of Oregon.

That on the 15th day of June, 1914, the United States District Court for Oregon, by a final decree prayed for by the Intervener (John L. Bisher, Jr., by his Guardian), herein set aside the decree and order of sale theretofore made by the said Court on April 30th, 1912, in the foreclosure suit of the Hamilton Trust Company, Complainant v. Cornucopia Mines Company of Oregon, et al., and its decree so made on the 15th day of June, 1914, ordered all the property described in the Hamilton Trust Company's foreclosure suit as aforesaid to be resold, and that a first lien thereon was made and declared in favor of the Intervener, John L. Bisher, Jr., by his guardian, v. Robert M. Betts, Receiver of Cornucopia Mines

Company; in which action said Bisher recovered a judgment for the sum of \$12,500.00, **on April 11th, 1913.**

That on the 30th day of July, 1914, the Hamilton Trust Company, complainant, v. the Cornucopia Mines Company of Oregon, et al., respondents, and John L. Bisher, Jr., by John L. Bisher, his Guardian ad liem, Intervener; the above named complainant and respondent, filed in the United States District Court for Oregon, their petition appealing from the foregoing decree made on June 15th, 1914, by said Court in favor of the said Bisher, as INTERVENER.

ASSIGNMENTS OF ERROR.

I.

The Court erred in permitting John L. Bisher, Jr., by John L. Bisher, his guardian ad litem to intervene herein, because the District Court of the United States for the District of Oregon, and the Judge thereof, had and have no jurisdiction, right or authority to permit said Bisher to intervene in the above entitled action, or of the matters, things or controversies involved therein, as the matters and things involved in said suit were fully and finally determined and closed by the final decree of this Court, by its decree made and signed on the 30th day of April, 1914; and the Court and Judge were without jurisdiction to make or grant the decree of this Court made and signed herein on July 10th, 1914.

II.

The Court erred in overruling and denying Complainant's motion to dismiss and disallow the petition in intervention filed herein by intervener on May 14th, 1913.

III.

The Court erred in sustaining and allowing the motion made and filed herein by intervener on the 12th day of December, 1913, dismissing and disallowing the answer of complainant filed herein on the 20th day of June, 1913; and said Judge exceeded his jurisdiction and erred in making an granting said order dismissing the Complainant's said answer, said order having been made and filed herein on December 22nd, 1913.

IV.

The Court erred in making a decree herein on the 10th day of July 1914, wherein it decreed and declared in favor of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, for injuries sustained by said John L. Bisher, Jr., on the 29th day of July, 1912, evidenced by a judgment, costs, and accrued interest thereon, and such lien was declared to be and exist upon any and all of the property mentioned and described in a certain trust deed or mortgage of Complainants therein, and on any and all property thereafter acquired by said The Cornucopia Mines Company of Oregon or the said Robert M. Betts, Receiver thereof; and that for the payment of satisfaction of said judgment and lien all of the

said property was thereby seized, and any and all of said property was thereby declared to be subject to such judgment lien and such claim of the said John L. Bisher, guardian ad litem, and the said lien declared and decreed in said decree to be superior and prior in time and right to the said lien created by a certain trust deed or mortgage of Complainant therein, and on any property conveyed to or acquired by The Cornucopia Mines Company of Oregon after the execution of such trust deed or mortgage, and on any and all property conveyed to or acquired by the said Robert M. Betts as Receiver thereof; and that any purchaser or purchasers of said property or any part thereof, took their respective conveyances and acquired any title they may have thereto, subject to the superior and prior lien in right and time to the lien created by the said judgment in favor of John L. Bisher, guardian ad litem.

(Transcript of Record, pages 173 to 175.)

ARGUMENT AND LEGAL AUTHORITIES.

The fundamental question involved and to be presented in this appeal, as to the law and the facts in our judgment are neither complicated nor intricate.

The main question presented for determination and decision, is what amount of credit and faith is to be placed in and relied upon in the final judgments, DECREES and Orders of the Courts of this country, affecting the property rights of the citizens and corporations taking title to property under

the JUDGMENTS, DECREES and final process of courts of record.

The Appellant (Hamilton Trust Company) commenced its suit in foreclosure in the Circuit Court of the United States of Oregon, against the Cornucopia Mines Company of Oregon and all other persons interested or claiming any rights or interest by way of judgment, lien or otherwise in the property set out and described in the Bill of Complaint filed in said Court on the 12th day of December, 1911.

Personal service of process was had and made upon all of the respondents in that suit.

The Complainant in that suit, and Appellant herein, prosecuted its suit to final judgment and decree in strict conformity with the law, procedure and rules of the United States District Court; the property was duly advertised and sold as provided by the decree and order of sale as made by the Court on the 30th day of April, 1912.

The final decree provided among other things; that the Hamilton Trust Company, Complainant, have judgment and decree according to the prayer of its bill in the sum of \$422,940.00, being the principal of said mortgage and interest as therein provided, and the further sum of \$10,000 attorneys' fees, together with its costs and disbursements, and that in default of such payment by the Cornucopia Mines Company of Oregon, Respondent, or by some one on its behalf, that all of the mortgaged property described in the mortgage or deed of trust, or

which has been acquired by it or the said receiver, or which may hereafter be acquired prior to the sale herein ordered, shall be sold by or under the direction of Ed. Rand, Special Master of the Court for said purpose, as one property, and not separately, as hereafter directed, to satisfy the amounts due, and to become due, for principal and interest on the outstanding bonds and the several sums decreed to be paid, or so much thereof as the property will bring upon the sale thereof, and that Ed. Rand, as Master aforesaid, make such sale in accordance with the practice of this Court; AND THAT AT SUCH SALE THE COMPLAINANT, OR ANY OF THE HOLDERS OF SAID OUTSTANDING BONDS, MAY BECOME THE PURCHASER OR PURCHASERS AT SUCH SALE; and that all of the property ordered to be sold under this DECREE shall be sold at public sale to the highest bidder, between 9 o'clock in the morning and 4 o'clock in the evening, at the door of the Court House of Baker County, in the City of Baker, Oregon.

The decree further provided; that the Master give notice of the sale of the property by publication for six successive weeks in the Pine Valley Herald a weekly newspaper of general circulation in Baker County, Oregon, and that the same notice be published in a newspaper of general circulation for six successive weeks in at least one daily newspaper published in New York City, New York State; that said notices shall contain a statement of the time and place of sale, the terms of sale, and a brief gen-

eral description of the mortgaged property to be sold.

“And it is further ORDERED AND ADJUDGED AND DECREED THAT THE PURCHASER OR PURCHASERS OF SAID MORTGAGED PROPERTY AT SUCH SALE SHALL BE ENTITLED TO USE AND APPLY IN MAKING PAYMENT OF THE PURCHASE PRICE ANY OF THE OUTSTANDING BONDS SECURED BY SAID MORTGAGE AS HEREIN PROVIDED, but a sufficient portion of the purchase price shall be paid in cash to provide for payment of all costs and expenses incurred herein, and that the Master return the cash proceeds of said sale to the Clerk of this Court and that the same be paid to the Clerk of this Court and upon the completion and confirmation by this Court of the sale made under and in pursuance of this decree the said Clerk of this Court shall pay out such moneys as follows (Transcript of Record, pages 54 to 61 inclusive):

- “1. The expenses of the sale of said property.
- “2. The expenses of the receivership.
- “3. The costs of this suit.
- “4. Complainant’s attorneys’ fees.
- “5. The taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.
- “6. All amounts due or to become due upon the bonds secured by said mortgage, and in case such proceeds shall be insufficient to pay in full the whole amount of principal and interest so due and unpaid on such bonds, then the proceeds shall be applied

ratably upon the whole amount due according to the aggregate thereof without preference or priority of any part over any other part thereof.

“7. The remainder, if any, to respondent, The Cornucopia Mines Company of Oregon, its successors and assigns.”

(Transcript of Record, pages 61-62.)

The final decree of April 30th, 1912, provided that upon the completion and confirmation of the sale of the Mines property at the Special Master's sale, which sale was made upon the 29th day of June 1912, that unless the property was redeemed as by law provided, that the Special Master should make and execute a fee simple deed to the purchaser of all the property sold at the said Master's sale. (Transcript of Record, page 62.)

No redemption was made of the property sold at the Master's sale as aforesaid;

The final decree in favor of the Hamilton Trust Company on foreclosure of the Mines Company's property, provided that Robert M. Betts, as Receiver, should also make and execute and deliver a good and sufficient deed of conveyance of any and all property of the Mines Company, or any interest therein, vested or standing in the name of the Receiver, or to which said Receiver has acquired any right, title or interest.

(Transcript of Record, page 63.)

That at the sale of the property on June 29th, 1912, C. E. S. Wood became the purchaser of all the

property of the Mines Company as Trustee for the bond-holders for the sum of \$432,000.00. (Transcript of Record, page 66.)

On August 6th, 1912, R. S. Bean, as United States District Judge, confirmed the sale of the property sold by the Special Master to Wood as Trustee, and ordered Ed. Rand as such Special Master to convey by a Master's Deed to Wood, Trustee, all the properties described in Complainant's Bill (Hamilton Trust Company), and Master's notice of sale, on the expiration of the redemption period of sixty days from the date of confirmation of sale, the Special Master, on the 7th day of October, 1912, made and executed a Master deed as directed and ordered by the Court, to C. E. S. Wood, as Trustee for the bond-holders. And in the order of confirmation of sale the Court provided that C. E. S. Wood, Trustee, having delivered to the Master at the time of sale of the properties on the 29th day of June, 1912, first mortgage bonds of the Cornucopia Mines Company of Oregon, in the sum of \$300,000.00, with accrued interest thereon in the sum of \$136,000.00, that "C. E. S. Wood Trustee, ought to be and hereby is credited with any overplus between the amount of said bid and the value of the bonds and accrued interest surrendered, and 'if upon any future showing such credit between said respective parties becomes material.'" (Transcript of Record, page 73.)

Appellants would call the Court's attention to Sections 3, 4, 6 and 7, of the Report of Robert M. Betts, as Lessee and Receiver of the Mines Com-

pany. (Transcript of Record, pages 75 to 77 inclusive).

“3. That during the said receivership of said Cornucopia Mines Company of Oregon as aforesaid he held and operated said Mines under a written lease with said Cornucopia Mines Company from the first day of November, 1911, until the first day of November, 1912.

“4. That hereby submits this his final report of the operation of said mines under said lease and receivership to this Court.

“6. That all the property of every kind and character, real and personal, and all assets of Cornucopia Mines Company of Oregon, Respondent, were sold under a decree and order of this Court on the 29th day of June, 1912, by Ed. Rand, the Special Master of the District Court of the United States for the District of Oregon who was theretofore appointed by this Court as such Special Master, and before said sale as aforesaid he duly qualified as such Special Master; that at such Master's sale as aforesaid, said property, real and personal, was sold to C. E. S. Wood, as trustee, by said Ed. Rand, as Special Master of this Court, and said sale was afterwards by this Court duly confirmed.

“7. That there is no other property, real or personal, of said Cornucopia Mines Company of Oregon, Respondent, unsold or remaining to be administered upon by said Receiver.”

SALE OF MORTGAGED PREMISES UNDER DECREE.

There is no contention on the part of the Appellee but what the mines and power plant and other property were sold under a mortgage foreclosure under a decree and order of sale made by the United States District Court for Oregon, on the 30th day of April, 1912, in favor of the Hamilton Trust Company, Appellant herein, and against the Mines Company, and the other respondent named in the Bill of Foreclosure;

That the sale was made under the foregoing decree on the 29th day of June, 1912.

That the sale under the decree was made by the Special Master (Ed. Rand), of the District Court of the United States for the District of Oregon, who was theretofore appointed by that Court as such Special Master, and before the sale he duly qualified as such Special Master; that at such Master's sale as aforesaid, said property, real and personal, was sold to C. E. S. Wood, as Trustee by said Special Master of said Court, and that such sale was afterwards duly confirmed by said Court in accordance with the law and rules of said United States District Court.

The Court will note that the said foregoing sale was duly made just thirty days prior to the date of the alleged injury (July 28th, 1912) to the Intervener and Appellee herein.

By the statute of the State of Oregon, Section

252, Lord's Oregon laws, Vol. P. 269, it is provided that a purchaser at an execution sale, or sale under a decree of foreclosure, is entitled to immediate possession of the property at such sale.

Said section reads as follows:

“THE PURCHASER FROM THE DAY OF SALE, UNTIL A RE-SALE, OR A REDEMPTION, AND A REDEMPTION FROM THE DAY OF HIS REDEMPTION UNTIL ANOTHER REDEMPTION, SHALL BE ENTITLED TO THE POSSESSION OF THE PROPERTY PURCHASED OR REDEEMED, UNLESS THE SAME SHALL BE IN THE POSSESSION OF A TENANT HOLDING AN UNEXPIRED LEASE, AND IN SUCH CASE, SHALL BE ENTITLED TO RECEIVE FROM SUCH TENANT THE RENTS OR THE VALUE OF THE USE AND OCCUPATION THEREOF DURING THE SAME PERIOD.”

The foregoing statute has been fully interpreted and passed upon by the Supreme Court of Oregon in:

Cartwright v. Savage, 5 Ore. 397.

Bank of British Columbia v. Harlow, 9 Ore. 388.

U. S. Mortgage Co. v. Willis, 41 Ore. 484.

Eldridge v. Hofer, 45 Ore. 243, 77 Pac. 874.

Gest v. Packwood, 39 Fed. 532.

Balfour v. Rodgers, 64 Fed. 927.

On and after the 29th day of June, 1912, when said mines and electric power plant were sold under the decree of foreclosure and order of sale by the

United States District Court, the purchaser thereat **immediately on the day of sale** took possession of said property under the decree and the foregoing statute, and from the day of sale by operation of law, and as a matter of law was in possession thereof; the purchasers title and ownership vesting therein from the date of sale as a matter of law.

The title of a purchaser at a judicial sale under a decree of foreclosure takes effect from the day of sale, and is paramount to and defeats any subsequent lien or incumbrance asserted by way of alleged damages for personal injury; the purchaser at a judicial sale takes a valid and unimpeachable title, and it cannot be successfully assailed except for fraud.

After the decree order of sale and notice of sale, and SALE, the premises so sold, cannot be withheld from the purchaser.

Osterberg v. Union Trust Co., 93 U. S. 424, 428, 23 L. Ed. 964.

Terrell v. Allison, 21 Wall. 289, 291, 22 L. Ed. 634.

The Intervener and Appellee attempts to assert a prior lien against the property of the Mines Company foreclosed by the Hamilton Trust Company, the Appellant upon a personal judgment for damages recovered against Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, for injuries alleged to have been suffered by him while an employee of said Receiver on the 28th day of July,

1912, in a suit filed in the United States District Court for Oregon, **on the 12th day of October, 1912**, a date prior to the sale of the property under the foreclosure suit of Hamilton Trust Company, Appellant, and prior to the confirmation of said sale.

To recapitulate, the decree made and entered in favor of Hamilton Trust Company, in foreclosing the mortgage against the Mines Company, dated April 30th, 1912, provided that the Master at the sale of the mortgaged premises which took place on June 29th, 1912, was by the said decree: "It is further ordered, adjudged and decreed that the purchaser or purchasers of said mortgaged property at such sale shall be entitled to use and apply in making payment of the purchase price any outstanding bonds secured by said mortgage as therein provided," but a sufficient portion of the purchase price shall be paid in cash to provide funds for payment of all costs and expenses incurred herein."

(Transcript of Record, page 61.)

That at the sale of the mortgaged property by the Special Master on the 29th day of June, 1912, C. E. S. Wood, as Trustee, became the purchaser thereat, and as part of the purchase price Wood, as Trustee, delivered over to Ed. Rand, as Special Master, 600 bonds of the par value of five hundred dollars each, or the total value of \$300,000.00, and interest coupons attached to the foregoing bonds drawing 6% per annum in the sum of \$136,000.00, and that the Special Master making said sale then and there accepted said bonds and accrued interest in full pay-

ment and satisfaction of the bid of Wood as Trustee on his bid of \$432,000.00 at the said sale, and then and there declared said Wood, as Trustee, the purchaser of the property described in the decree and order of sale of April 30th, 1912.

That at said sale C. E. S. Wood, as Trustee, paid in cash, besides the bonds of the value of \$300,000.00 and the \$136,000.00 accrued interest thereon:

1. The expenses of the sale of said property.
2. The costs of the suit.
3. Complainant's attorneys' fees.

4. That there were no expenses at the date of said sale (June 29th, 1912), of the receivership therein, nor taxes or other expenses incurred at said foregoing date.

We refer the Court to the Report of C. E. S. Wood, as Trustee, in his report to the United States District Court for Oregon, found on pages 245, 246 and 247, Transcript of Record.

REPORT OF TRUSTEE.

To the Honorable Charles E. Wolverton United States District Judge:

Comes now C. E. S. Wood, one of the attorneys for the Hamilton Trust Company, complainant herein, and at the suggestion of the Court, informs the Court:

That he attended the sale held and conducted by Ed. Rand, a Special Master duly appointed by this Court, under the decree of this Court dated the 30th day of April, 1912, wherein said Special Master was ordered to sell the real and personal property described in said decree.

That said Special Master of this Court after full compliance with the orders and directions of said decree of this Court made on the said 30th day of April, 1912, offered said real and personal property described in said decree for sale on the 29th day of June, 1912, in front of the Court House in Baker City, Baker County, Oregon, to the highest bidder thereat.

That at said sale as aforesaid, I, C. E. S. Wood, as Trustee became the purchaser of said described real and personal property, for the sum of \$432,000.00, and delivered to said Special Master of this Court the first mortgage bonds in the sum of \$300,000.00, and accrued interest on said bonds in the sum of \$136,000.00, as provided and decreed by this Court in its said decree of April 30, 1912, in the above entitled suit; and that in addition to the payment of the foregoing sums, I paid cash expenses of said sale of said property in full to date of sale; the costs of this suit and complainants' attorney's fees in full.

That on the date of said sale of said property, the 29th day of June, 1912, there were no expenses of the receivership of said property nor taxes nor other expenses incurred in the care, custody or receivership of the property sold as aforesaid to me as Trus-

tee at the date of sale thereof, to-wit, the 29th day of June, 1912.

C. E. S. WOOD,
Trustee.

Ed. Rand the Special Master that made the sale of the properties, on July 5th, 1912, made a report to the United States District Court for Oregon, of the sale, and in that report of sale he set out the following: "I further report that I have delivered to said C. E. S. Wood, Trustee, a copy of this report, duly signed by me, as A CERTIFICATE OF SALE, and that I hold said bonds to be returned into the registry of this Court, or otherwise, as the Court may direct, to be canceled, and as so canceled, to be re-delivered to the Respondent, The Cornucopia Mines Company of Oregon, as the purchase price paid by the purchaser, C. E. S. Wood Trustee, for said properties, and as liquidation of the indebtedness of said, the Cornucopia Mines Company of Oregon."

(Transcript of Record, page 67.)

In the decree made in favor of the Intervener and Appellee (Bisher), by the United States District Court for Oregon, on July 10th, 1914, by which decree said United States District Court set aside and vacated and ordered a re-sale of the property theretofore by its former decree and order of sale, dated April 30th, 1912, in favor of the Hamilton Trust Company, in its foreclosure suit against the CORNUCOPIA MINES COMPANY OF OREGON; Judge Wolverton, in the decree and order of sale

of July 10th, 1914, gave the following reason for vacating and setting aside the said decree and sale:

“COURT: That is the very reason why this Court is inclined to allow this procedure by which an execution may go against this property for a resale. The order of the Court provided, when the sale was made that the purchaser might pay in bonds, but the expenses and costs of the sale, and, by my rendition of the order of sale, the expenses and costs of the receivership should first be paid. The purchaser has not complied with that order. The purchaser has not paid the costs of the receivership, which I think to be legitimate costs, including this demand. And I think there ought to be a report made as to what was done in that respect, and what money was paid into Court, and why this other money was not paid.”

(Transcript of Record, page 212.)

The Cornucopia Mines went into the hands of a receiver.

While the property was under operation by the receiver a man was injured; an employee of said receiver. The injury occurred in the interim between sale by the receiver and the confirmation thereof. The action for personal injuries was not instituted until after the order of confirmation had been taken. The question arises whether the plaintiff's remedy is against the fund realized at the sale or against the property itself.

The question arises, when does the receiver's liability for damages for personal injuries sustained

during the receivership cease; in the present case Appellants' however, insist that the personal injuries alleged by the Appellee and Intervener herein did not occur during the receivership; the property under the receivership was sold on June 29th, 1912, and the alleged injury did not occur until July 28th, 1912.

Where the decree and order of sale clearly provides and directs that the property shall pass subject to all indebtedness incurred by and under the receivership, the purchaser at the sale would be put on his notice and would be charged with any liens or claims against the property.

Farmers' Loan & Trust Co. v. Central R. Co.
of Iowa, 17 Fed. 758.

A judgment against a receiver, recovered after a sale of the property under the receivership, which at the time of sale was not charged with an existing lien or indebtedness incurred during the receivership, and after the receiver had submitted his accounts does not give or create a lien on the property that was subject to the receivership.

Peterson White v. The Koekuk & Des Moines
R. Co., 2 N. W. 556.

Under all the authorities that we have been able to find after diligent search, the liability of a receiver or the purchaser at a judicial sale depends wholly upon the provisions of the decree and order of sale.

There is no suggestion in the decree and order

of sale in this case, that the purchaser at the sale of the property sold under the mortgage foreclosure on June 29th, 1912, purchased or took the property CUM ONERE as to a personal injury alleged to have occurred on July 28th, 1912, or thirty days after the property under the receivership was sold at the Master's sale.

“The rights and liabilities of a purchaser at a judicial sale are measured by the terms and conditions of the decree. If the decree directs a sale subject to liens established or to be established or subject to debts and liabilities incurred by a receiver in the management of the property, the purchaser at the sale takes the property cum onere, and liability in the hands of the purchaser, or his assignee.”

In this case the money secured by the Receiver at the sale had been exhausted in the payment of other claims against the Receiver before the claim of the Appellee had been in existence, or the personal injury upon which the lien was predicated occurred as adjudicated by the Court. The sale had in all things complied with the directions of the Court and decree and the conditions met with by the purchaser. On the question of whether or not the Court after confirmation could impose further conditions the Court said:

“We are at a loss to understand upon what principle the Court can, in such case, after confirmation of the sale, and the performance of the conditions of sale, decree a further condition which in substance, enhances the price to

be paid for the property. If the Court had authority to compel the purchaser to pay one thousand dollars in addition to the price bid, it might, with equal propriety, when circumstances demanded, compel him to pay a hundred thousand dollars. The sale, when confirmed by the Court, and its conditions met by the purchaser, created in effect, a contract between the Court and the purchaser, and the Court could no more impose an additional term or condition upon that contract than could an individual."

"The appellee acquired by his award no lien upon the property. The award would be imposed as an equitable lien upon any fund in the hands of the Receiver, but there was, at the passing of the decree no such fund. It had previously been exhausted in the discharge of other obligations. We see no propriety in imposing the burden of the payment of the appellee's claim upon the appellant. It might, we think, with equal propriety be imposed upon a stranger to the record."

Facts very similar to those under consideration arose in the case of *Farmers' L. T. Co. v. Central R. of Iowa*, 7 Fed. 537-542. This case arose upon the consideration by the Court of a motion to rescind an order made theretofore by the Court granting one certain Mahala Clear, as next friend to rescind an order made theretofore by the Court granting one certain Mahala Clear, as next friend of Edward Sloan, to sue H. L. Morrill, late Receiver of the Central R. Company of Iowa for personal in-

juries received by said Sloan during the receivership of said Morrill.

The order granting leave was made after Morrill had been discharged and subsequent to the final decree by which the railroad property and all its funds had been turned over to the purchaser.

The Court in considering the motion said at page 538:

“This motion raises a very difficult and embarrassing question. It is this: When, in a foreclosure suit, a Receiver appointed by the Court has been discharged, and the property by the Court, turned over to the purchaser, how are unsatisfied claims against the Receiver, upon torts committed and contracts made by him, to be prosecuted and satisfied? Who are to be made defendants to actions upon such claims? How are such cases to be tried?

* * * * *

“What would be the remedy of the claimant if the Court should discharge the receiver and place the fund or property beyond its control by turning it over, without reservation to a purchaser?

Answering the last question the Court goes on to say:

“I confess that if the fund or property should be turned over to a purchaser without reservation, I am at a loss to see what the remedy of the claimant would be—as for example, the old railroad company—in this case. How could he found a personal action of tort

or contract against a party who would be a stranger to the tort or contract? How could he count upon or prove the tort or contract against a party who never committed the one nor made the other?

It will be noted that again in the foregoing case the principle that the decree is the source of the right to hold the fund or the purchaser, respectively, appears.

It is undoubtedly true as a matter of law and procedure that the terms of the decree and order of sale, and the decree of confirmation constitute the contract of purchase, and that, therefore, it was not within the power of the Court to impose further terms, or to declare a lien upon the property not provided for and contemplated by the final decree of foreclosure of April 30th, 1912, and the confirmation of sale.

Railroad Co. v. McCammon, 18 U. S. App. 628, 10 C. C. A. 50, and 61 Fed. 772; 18 U. S. App. 709.

PRIORITY MORTGAGE LIENS.

We take it that the attorneys' for Appellee are too sound lawyers to seriously contend that had the mines been operated by the owners instead of by the Receiver that Appellee and Intervener would have had a first and prior lien for personal injuries against the first mortgage bond holders.

Ex parte Brown, 15 S. C., 518, the case of Davenport v. Alabama & C. R. Co., supra, in which case the Court said it was regarded as too clear for argument that if the road had been run by the president and directors when the injury was sustained, such a claim could not possibly have priority; but the Receivers act merely in the place of the president and directors, except so far as the Court may otherwise direct. A Receiver is merely substituted for a corporation or concern; the Receiver is appointed to represent, in law, the interest of the insolvent institution. That with the exception of debts for taxes and Receiver's certificates issued to pay taxes to keep the institution going there could be no priority or preference among debts and claims for damages allowed precedence over first mortgage bonds, notwithstanding certain orders made by the Court below. Union Trust Company of New York v. Illinois Midland Railway Co. et al, 117 U. S., 434 29 L. Ed., page 963.

The only exception to the foregoing rule and authority are in those class of cases where the claim for damages for personal injuries on railroads operated by a receiver, has been held to have priority out of the fund realized from the earnings in preference to a mortgage, but in any event not out of the corpus (15 S. C. 518.) Klein v. Jewett, 26 N. J. Eq. 474; Texas P. R. Co. v. Overheiser, 76 Tex. 437, 138 W. 468; Texas P. R. Co. v. Johnson, 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; Texas & P. R. Co. v. Miller, 79 Tex. 78, 11 L. R. A. 395, 23 Am. St. Rep.

308, 15 S. W. 264; *Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 15 S. W. 214; *Texas P. R. Co. v. Griffin*, 76 Tex. 441, 13 S. W. Tex. 471; *Texas & P. R. Co. v. Comstock* 83, Tex. 537, 18 S. W. 946.

It seems to be well established in the operation of railroads under receiverships that personal injuries to employees are considered part of the operating expenses and are entitled to payment as such out of the earnings of the property, but can not be satisfied out of the corpus of the property. Claims for personal damages are paid out of the net income if that is sufficient, but they have no priority in law over the first mortgage indebtedness or other existing liens, judgments or indebtedness existing when the action is brought in which the receiver was appointed, 41 L. R. A., N. S., pages 700 and 702; *Pennsylvania Steel Co. v. New York City Railway Co.*, 165 Fed. 457; *St. Louis Trust Company v. Riley*, 30th L. R. A. 456, 16 C. C. A. 610, 36 U. S. App. 100, 70 Fed. 32. *Guaranty Trust Co. v. Metropolitan Street R. Co.*, 18 Fed. 637.

In the case of *White v. K. & D. M. R. Co.*, 2 N. W. Rep 1016, the plaintiff received certain injuries in the operation of the railroad in the hands of a special receiver pending the foreclosure of first mortgage bonds, in which action he recovered a judgment against such receiver; the Court held that such claim for personal damages did not stand on the footing of expenses of the receivership after the receiver had made his accounting and created no lien in equity, or otherwise, that could be enforced against

the corpus, and that the purchaser at the foreclosure sale was in no wise liable for the judgment for personal damages and that the purchaser took the property at the sale clear and unincumbered of all claims and liens other than for taxes and costs.

In this case "it is contended that the claim of the Appellee (Intervener herein) for injuries was an equitable lien prior to the mortgage liens upon the railway property and franchises, which were in the hands of a receiver at the time of the injury, and that the claim stands upon the "precise" footing of claims against the receiver arising during his receivership for labor and supplies during his operation of the road." The Court said in its opinion: "This position is not tenable. It is true the first mortgage provided that the expense of the trust should be first borne by the mortgaged property. The expense of the trust could, by no possible rule of construction, be held to include claims for personal injuries arising while the trust deed was in process of foreclosure, and the road in the hands of a receiver. The decree authorized the receiver to pay the current expenses of operating the road, and to be used in operating the same. Now, what is meant by an equitable lien, for the injury complained of is difficult of comprehension. Liens for personal injuries sustained by the employees of railroad companies are created by statute in this state (a claim for personal injuries in the case of the Appellee, and the Intervener in this action, is founded and predicated upon the Employers' Liability Law of Ore-

gon), and claims of this character only become liens when reduced to judgment. It is possible, if the plaintiff had recovered his judgment before the Receiver was discharged and the Receiver had paid the judgment he would have been allowed to deduct the same from the funds in his hands, but an action against the purchaser of the road to establish a judgment as a lien as against the property purchased at a sheriff's sale is quite another thing. Second in this case, it is insisted that the road and property purchased by a committee of the bond holders should be charged with the payment of the judgment, because the Receiver was the agent and receiver of the mortgagees and was operating the road for the benefit of the mortgagees when the plaintiff was injured. This position can not be maintained, the Receiver was the agent of the Court. The property was in the custody of the law. His possession is the possession of the Court for the benefit of whoever may ultimately be determined to be entitled to its possession. High on Receivers, Sec. 134, *Wishall v. Sampson*, 14th Howard, 61.

The Court further said: "It seems to us if a judgment against a receiver for an injury by reason of the negligence of his employees is a lien upon anything, it must be upon the earnings of the road which may be in his hands by virtue of his appointment as receiver, and WE KNOW OF NO CASE WHERE ANY OTHER OR DIFFERENT RULE HAS BEEN ADOPTED. No doubt the Court, which appoints and controls a receiver, has a right

to provide for the payment of all just claims arising out of the operation of a road by a receiver, and we believe the uniform practice is to allow claims to be paid out of the funds in the receiver's hands, BUT NO CASE HAS COME TO OUR NOTICE where it has been held that the purchaser of a railroad and franchises takes the property charged with claims for personal injury which occurred while it was in the hands of a receiver, and before the title passed to the purchaser. On the contrary, in *Berry v. B., C. R. & N. P.* supra, it is held that the purchaser takes the property free from any claims or causes of action of this character."

In the case of *Chicago & O. R. R. Co. v. McCammon*, 61 Fed. 772, was a case where a receiver was appointed to operate a railroad pending the foreclosure of first mortgage bonds. The Court entered a decree in the case foreclosing the bonds wherein it was directed that the property be sold to satisfy the mortgage. The property was bid in and payment made in the first mortgage bonds and part in cash, substantially as provided in this case, THE SALE WAS MADE AND AFTERWARDS CONFIRMED, AND THE COURT AFTERWARDS, ON A MOTION IN INTERVENTION, HELD THAT THE COURT HAD NO POWER TO DIRECT A PURCHASER AT A MORTGAGE SALE TO PAY A CLAIM WHICH HAD BEEN ADJUDICATED AGAINST A RECEIVER AFTER THE CONFIRMATION OF THE SALE; this case presents the similar facts that the Appellee

and Intervener herein is attempting to subject the corpus to the satisfaction of a judgment procured by him long subsequent to the sale of the property and the confirmation thereof to the Appellant herein. The Court in denying the right of the petitioner and intervener to subject the mortgaged property under the receivership in the foregoing suit to the payment of intervener's claim, said that "THE RIGHTS AND LIABILITIES OF A PURCHASER AT A JUDICIAL SALE ARE MEASURED BY THE TERMS AND CONDITIONS OF THE DECREE. If the decree directs the sale subject to liens established, or to be established, or subject to debts and liabilities incurred by the Receiver in the management of the property, the purchaser at the sale takes the property cum onere, and liability for the claims so reserved by the decree follows the property in the hands of the purchaser, or his assignees. The liability of the Appellant for a claim with which it has been charged must therefore depend upon the terms of the decree of November 1885." "It is clear that the property was directed to be sold discharged of all liens and claims." * * * There is no suggestion in the decree in this case that the mines property was to be sold subject to any lien whatever except the cost of the sale and attorneys' fees, etc.

"The difficulty attending the payment of the Appellee's recovery for damages arising from the fact that the fund obtained by the sale was insufficient, having been absorbed in the payment of other claims against the Receiver before the claim of the

Appellee had been adjudged by the Court. The sale would seem to have been in exact accordance with the directions of the Court to have been confirmed by the Court and the conditions of the sale to have been fully met by the purchaser. WE ARE AT A LOSS TO UNDERSTAND UPON WHAT PRINCIPLE THE COURT CAN, IN SUCH CASE, AFTER CONFIRMATION OF A SALE, AND THE PERFORMANCE OF THE CONDITIONS OF THE SALE, DECREE A FURTHER CONDITION, WHICH, IN SUBSTANCE, ENHANCES THE PRICE TO BE PAID FOR THE PROPERTY. IF THE COURT HAD AUTHORITY TO COMPEL A PURCHASER TO PAY ONE THOUSAND DOLLARS IN ADDITION TO THE PRICE BID, IT MIGHT, WITH EQUAL PROPRIETY, WHEN CIRCUMSTANCES DEMANDED, COMPEL HIM TO PAY ONE HUNDRED THOUSAND DOLLARS. THE SALE, WHEN CONFIRMED BY THE COURT, AND ITS CONDITIONS MET BY THE PURCHASER, CREATED, IN FACT, A CONTRACT BETWEEN THE COURT AND THE PURCHASER, AND THE COURT COULD NO MORE IMPRESS A CONDITION OR TERM UPON THAT CONTRACT THAN AN INDIVIDUAL. *Farmer's Loan & Trust Co. v. Central R. of Iowa*, 7 Fed. 537; *Davis v. Duncan* 19 Fed. 477. The Appellee, cleared by his award, takes no lien upon the property. The award would be imposed upon an equitable lien upon any fund in the hands of the Receiver, but there was,

at the passing of the decree, no such fund. It had been previously exhausted in the discharge of the other obligations. We see no propriety in imposing the burden of the payment of the Appellee's claim upon the Appellant. IT MIGHT, WE THINK, WITH EQUAL PROPRIETY, BE IMPOSED UPON A STRANGER TO THE RECORD. THE DECREE WAS ALLOWED BY THE COURT IN MIS-CONCEPTION OF THE TERMS OF THE FORECLOSURE DECREE."

PRIORITY OF LIENS.

A judgment in a negligence case was held not entitled to priority out of funds in the hands of a receiver appointed in a mortgage foreclosure before the mortgage was paid. *Farmer's Loan & T. Co. v. Detroit, B. C. & A. R. Co.*, 71 Fed. 29; *Farmer's Loan & T. Co. v. Northern P. R. Co.*, 74 Fed. 431, 71 Fed. 245.

In the discussion in this case the Court referred to the case of *Fosdick v. Schall*, 99 U. S. 252, 25 L. Ed. 342, and said: "This, however, affords no warrant for the contention that all the liabilities incurred by a railroad company in the operation of its road before a mortgagee demands possession, or before the appointment of a receiver, are to be rated in the catagory of current debts and expenses entitled to preference over the claims of the bond holders. As elsewhere said in the case just cited the expense and debts which are held prior in equity to the mortgagee's debt are outstanding debts for labor,

supplies, equipment, or permanent improvement of the mortgaged property. There is nothing in that case, nor in the subsequent decisions of the Court, extending this preference to other classes of claims." So, the claims against a railroad for causing death is not entitled to priority against a fund in the hands of a receiver as against a mortgage, as there was no diversion in this case, and as said in the *Farmer's Loan & T. Co. v. Green Bay W. & St. P. R. Co.*, 45 Fed. 664, there can not be a restoration without a diversion.

Central Trust Co. v. East Tennessee V. & G. R. Co., 34 Fed. 895; *Ames v. Union P. R. Co.*, 74 Fed. 335; *St. Louis Trust Co. v. Riley*, 30 L. R. A. 456; 16 C. C. A. 610, 36 U. S. App. 100, 70 Fed. 32; *Foreman v. Central Trust Co.*, 18 C. C. A. 321, 30 U. S. App. 653, 71 Fed. 776.

A first mortgage given in good faith and duly recorded is prior, superior and paramount to a judgment for personal injuries subsequently occurring. *Coe v. New Jersey M. R. Co.*, 31 N. J. Eq. 127.

Then in summarizing the principles which underlie this subject of priorities, it may be said that if the premises are already incumbered by a first mortgage to a bona fide incumberancer, the claim of a mechanic for personal injury is subordinate to that of the mortgagee; the greater weight of authorities seem to recognize this as the law covering the subject. *Munger v. Curtis*, 42 Hun. 465.

However, from Appellant's contention it is not necessary that it should urge or stand upon the

foregoing authorities as the Receiver was not in possession or operating the property upon which the alleged injury took place on the 28th day of July, 1912, as the property was then in the hands of C. E. S. Wood, Trustee, as purchaser under the sale that took place on June 29, 1912.

Union Trust Co. of New York v. Illinois Midland Railway Co. et al, 117 U. S., L. Ed. 963. A distinction exists between a private corporation and a railroad corporation that should be distinguished in the discussion of a law as to priorities over mortgages. A railroad corporation is a quasi public institution, charged with the duty of operating its road as a public highway. If for any reason a railroad becomes embarrassed and unable to perform its public duty, the Courts, pending proceedings for the sale of the road, will operate it by a receiver, and make the expense incident thereto as a first lien on the theory of the larger duty that it owes the public. This is done on account of the peculiar character of the property. Railroads are generally mortgaged to secure bonds, and the public who invests in such securities have knowledge and notice that railroad securities rest upon mortgaged property. Private corporations, however, owe no duty to the public, except to observe the law as an individual is obligated to do. Generally the operation of a private corporation is not a matter of public concern. And the decisions of the Supreme Court of the United States are uniformly in line in sustaining orders giving priority to liens by way of receivers' certifi-

cates or mechanics' liens for personal injuries in cases of railroad receiverships, and in relation to private corporations for which receivers have been appointed having no application to mortgages executed by a private corporation.

Fosdick v. Schall, 99 U. S. 235, 25 L. Ed., 339; Barton v. Barber, 104 U. S. 126, 26 L. Ed. 672; Miltenberger v. Logansport C. & S. W. R. Co., 106 U. S. 286, 27 L. Ed., 117; Union Trust Co. v. Illinois M. R. Co., 117 U. S., 434, 29 L. Ed. 963; Wood v. Guaranty Trust S. D. Co., 128 U. S. 421, 32 L. Ed. 472; Neeland v. American Loan & Trust Co. of Boston, 136 U. S. 89, 34 L. Ed. 379; Morgan's L. & T. R. & S. S. Co. v. Texas Central R. Co., 137 U. S. 171, 34 L. Ed. 625.

In the case of Wood v. Guaranty Trust & S. D. Co., the Supreme Court of the United States said: "The doctrine of Fosdick v. Schall has never yet been applied in any case excepting that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern."

In the case of St. Louis Trust Co. v. Riley, by next friend, 70 Fed. Rep. 32. This was an action on the part of Riley to recover damages against the Trust Company while he was engaged as a motor-man in the operation of an electric car. The property was being operated by a Receiver appointed, as in the case at issue, for the foreclosure of a mort-

gage. Riley recovered a judgment for \$5,000 in his action for damages against the Trust Company et al. On an intervening petition in the foreclosure suit the Court below held that the claim of Riley, the appellee, upon the earnings of the property of the railway company during the receivership was superior to that of the mortgages and directed the Receiver to pay it in preference to the mortgage debts. From this decision of the lower Court and order error was assigned and appeal perfected. The counsel for Riley, appellee, argued in that case that damages for the negligence of a railroad company are the necessary expense of operation of a railroad and rested his contention chiefly upon the decision in *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, but the Court said: A claim for damages for the negligence of a mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgaged security. Wages, traffic balances and supplies produce an increased income and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of a mortgagor neither produce an income or enhance the value of the property; that damages for negligence occur in violation of that contract; the negligence that is the foundation of this claim did not tend to keep the railroad in operation, but if repeated and continued would inevitably stop it, it was not necessary but was deleterious, in its operation. The Court said that "for these reasons this claim for damages can not, in our opinion, be

allowed a preference over a mortgage debt in payment out of the income earned by the receivers appointed under the bills for the foreclosure of these mortgages.”

AS TO THE RIGHTS AND LIABILITIES OF A PURCHASER AT A JUDICIAL SALE; ARE MEASURED BY THE TERMS AND CONDITIONS OF THE DECREE.

Chicago & O. R. R. Co. v. McCammon, C. C. of App. 61 Fed. Rep.; Continental Trust Co. of New York v. American Security Co., C. C. of App. 80 Fed. Rep.

AS TO THE LIENS OF A MORTGAGE ON AFTER ACQUIRED PROPERTY.

The mortgage foreclosed by Appellant's Bill in this suit provided that after acquired property, and all improvements thereafter placed upon the same, was to become part of the mortgaged property under the mortgage given. The mortgage provided: “33. The buildings, structures, erections and constructions, and all improvements now or hereafter placed upon any of the hereinbefore described property with their fixtures” * * * “above conveyed and transferred, or intended so to be, now held or hereafter acquired, shall be decreed real estate for all the purposes of this indenture (mortgage) and shall be held and taken to be fixtures and appurtenances of said Cornucopia Mines and part thereof and are to be used, and in case of a sale thereunder, are to be sold therewith.” (Transcript of Record, pages 20 and 21.) See note to Pennock v. Coe, 64 U. S., L. Ed. 436.

The first case adjudicated by the Supreme Court of the United States and which fully considered and discussed the question of the power of a Court of Equity to make preferences in suits to foreclose mortgages, was in the leading case of *Fosdick v. Schall*, 99 U. S. 253, 25 L. Ed., 342. In that case the Court rendered a unanimous judgment which was delivered by Chief Justice Waite, and the opinion rendered in that case is the foundation of the doctrine of preference and priorities in the Federal Courts, and there is no case prior to that judgment in the Federal Courts that has any application to the doctrine; of this fact Appellants have fully advised themselves by a complete and exhaustive research of all the authorities.

No case has been passed upon by the Supreme Court of the United States, involving the question of preferential debts and priorities, in which that Court has not rested its decision on the doctrine announced in the case of *Fosdick v. Schall*. The case has been quoted very extensively and approvingly where ever it has been referred to. Not in a single instance has this case been overruled, criticised or modified or suggested as *obiter dicta*.

The whole doctrine of priorities as shown by the adjudications by the Courts is of modern origin, and it is based solely upon equitable considerations and reason, and its distinctions, application and discrimination rests in a large degree upon the sound judicial discretion of the Courts of equity, applying and having due regard to all the details and circum-

stances and the facts involved in each particular case. It may be true that some contrariety of judicial opinion and application of the principle of this doctrine rests solely on equitable considerations, largely deduced from judicial discretion as would be inevitable. It is impossible to lay down any absolute, positive, inflexible rule for the application of the doctrine. Each case must be examined and determined upon its own special facts and equities. Each case will be found to present its own peculiarities which must in some degree influence the Courts of equity in their final decisions.

In *Lackawanna Iron & Coal Co. v. Farmer's Loan & Trust Co.*, 176 U. S. 298, 44 L. Ed., 475, and in *Southern R. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 44 L. Ed., 457, after reviewing these cases the Supreme Court said: "The decision in each case has been more or less controlled by its special facts."

One holding a mortgage upon mining property has the same right to demand and expect of the Court respect for his vested and contracted priority as the holder of a mortgage on a city lot or farm. When the Court appoints a receiver of property on a mortgage foreclosure, and orders a sale of the property which is regular under the law and the rules of the Court, it has no color of legal or equitable right after said sale has been made, reported to the Court by the Master making the sale and the confirmation thereof had, to order a re-sale of the same to satisfy a judgment procured subsequently by the Intervener and Appellee in this suit. If there

is any authority in law for a Court of equity so to do and act, Appellants have been unable to find such a case in the books.

The rights of these Appellants in the mines property adjudicated under their Bill of Foreclosure and sold by the terms of the decree and order of sale directing the sale of the property on the 29th day of June, 1912, and the confirmation of the same prior to the institution of suit for personal damages and judgment in said suit in favor of the Appellee deprives the Court of any authority in law or equity to set aside the former decree and sale thereunder. That decree was final and should not be questioned or altered by the Court below.

Mills v. Hoag, 7 Paige 18; Beebe v. Russell, 60 U. S., 19 How. 285 (15:668); Ray v. Law, 7 U. S., 3 Cranch 179 (2:404); Thompson v. Dean, 74 U. S., 7 Wall, 342 (19:94); R. R. Co. v. Bradleys, 74 U. S., 7 Wall, 575 (19:274); Green v. Fisk, 103 N. S. 518 (26:486); Grant v. Phoenix Ins. Co., 106 U. S., 429 (27:237); Bostwick v. Brinkerhoff, 106 U. S., 3 (27:73); R. R. Co. v. Express Co., 108 U. S. 24 (27:638); Winthrop Iron Co. v. Meeker, 109 U. S. 108 (27:989).

The question then is: Did the purchaser at the sale under the decree of April 30, 1912, and the order of sale thereunder, take the mines property at said sale free from all liens, claims and incumbrances? Appellants answer: That under the terms of said decree and the order of sale it purchased and took the property as such purchaser free and clear from

all claims against the Receiver arising out of the operation of the mines; that the Court ordered no condition, nor imposed any upon the purchaser under the decree and order of sale but what he fully complied with. That the purchaser at such sale can only be held liable according to its terms. It follows then that the purchaser at said sale can not be held liable for payment of a judgment asserted by Appellee, and Intervener, herein, as he purchased and took possession upon the date of purchase under the statute of the United States and the statute of the State of Oregon in relation to judicial sales and purchases thereat as hereto referred to and set out in this brief.

ROBERT M. BETTS, Receiver, testified in the intervention proceedings. He was interrogated by C. E. S. Wood, who purchased the mines property at the Master's sale.

QUESTIONS BY MR. WOOD:

Q. Mr. Betts, there has been some question herein as to properties that were acquired by the Cornucopia Mines Company, deeds to which were executed by you as Receiver subsequent to the sale to me as Trustee at Baker City—I forget the date myself. I wish you would take up the history of those matters and make report of it now in Court, exhibiting such deeds and documents as you have.

A. The matter is simply this: The company has never had sufficient power to operate the mine and the mill and it had been planned on the part of the receivership to extend the present pipe line farther

down the creek in order to obtain a higher head, and thereby increase the power; and, as this was necessary for the benefit of the mine, I made application to the State Engineer and offered to buy a piece of ground from Alexander McDonald.

Q. State when you made this application, if you made the negotiations.

A. The application was made on the 3rd day of February, 1912.

A. Well, I will have to amplify that a little bit by saying that we already owned the water right and we merely took the same water and carried it under pressure farther down the creek, but that the State law required that we ask for a permit, so I asked for a permit for 9 1-3 cubic feet per second, the power to be applied for mining purposes.

Q. You asked for that as Receiver?

A. I asked for that as Receiver.

Q. And the water you already were using, already had the water rights?

A. We already had the water rights, since 1895.

Q. And this was not an amplification of that at all?

A. Yes.

Q. Was that an application for a new water right?

A. No, sir.

Q. What was it?

A. It was an application to carry this water farther down the creek.

Q. For what purpose?

A. For the purpose of generating more power.

Q. Getting greater head?

A. Getting a greater head.

A. I purchased five acres of ground from Alexander McDonald on which to locate the power house.
(Trans. Rec., pages 181, 182 and 183.)

COURT: Have you made a report in this case?

A. Yes, your honor.

Q. Just state who furnished the money and produce the voucher showing it.

A. Well, the money was furnished by the Receiver and the Leese. The bank account is carried as Robert M. Betts, Receiver.

Q. Where did the funds originate? Where did they come from? From the earnings of the mine?

A. Yes, sir.

(Trans. Rec., page 184.)

A. The consideration was \$250.

MR. JOHNS: I mean the consideration expressed in the deed.

A. Two hundred and fifty dollars, and it was filed for record August 16, 1912, in Baker County.

(Transcript Rec., page 187.)

Consideration \$250. Filed for record the 7th day of August, 1912, Book 77, page 183.

COURT: Do I understand this covers practically the same land as was covered by the prior deed?

A. It covers the same ground. Yes, sir; there was no more money consideration. That is, we didn't pay him any more money.

Q. Mr. Betts, do I understand that you put the same number of acres in this later deed that has been

read into the record as was included in the former?

A. Yes, sir.

Q. You simply extended it in a different form and shape?

A. Yes, sir; that is all, we made it more rectangular.

COURT: Well, the two deeds together, then, would make more than five acres that you got.

A. Well, they would.

(Trans. Rec., page 188.)

Q. Go on, Mr. Betts.

A. I supposed that the water right in this deeded land from McDonald went with the property covered by the mortgage. That was my interpretation of the mortgage, but the water right in Salem stood on record as Robert M. Betts, Receiver, so I wrote to the State Engineer and asked him to change that to the name of the Cornucopia Mines Company of New York—the new owners. In reply he stated that a request like that was not sufficient, that it had to be something to be written into the records, so he asked for a deed to be made out to be placed on file—the deed, which is this deed.

Q. That is what is known as the Receiver's deed, then, is it?

A. Yes, it was made out and sent to Salem for record, and that is all there was of the matter.

COURT: Give the date of the deed and read the description. This deed is from you?

A. From me to Cornucopia Mines Company of New York. The date of the deed is November 20.

1912, from Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, to the Cornucopia Mines Company of New York.

(Trans. Rec., pages 189 and 190.)

COURT: What were you going to say?

A. I was going to say, your honor, so that this won't be misunderstood, when I talked with McDonald about getting this new power site he wanted us to give up the old power site when we were through with it, as it was good land and he could use it for agricultural purposes, so I agreed with him that if he would take down the old power house I could give him back the land; but we decided that it was necessary to keep this old power house and that I would pay him \$250 additional. Then when I finally gave him the balance, we decided to keep the power house, I gave him \$300 on account of the expense we had put him to in tearing up his field and putting this pipe line in, and getting ready for the pipe line. So altogether he was paid \$550.

(Trans. Rec., pages 197 and 198.)

COURT: Does this cover the same ground again?

A. Yes.

COURT: The same five acres?

A. Yes, sir.

COURT: You have three deeds?

A. Three deeds covering practically the same ground.

(Trans. Rec., page 199.)

MR. JOHNS: He made it himself as Receiver.

A. Not as Receiver; no, sir.

COURT: In what capacity?

A. Cornucopia Mines Company of New York.

(Trans. of Rec., page 202.)

COURT: Well, you got an additional water right?

A. No, that is not an additional.

Q. This is an amendment of the permit No. 1060?

A. This doesn't take any more water. It merely changes the point of diversion.

Q. Do you know about what distance the change was made—that was made by that change?

A. About a mile—a mile in length.

Q. It gave you that much more power?

A. It gave no more power whatever.

Q. Then why did you do it?

A. Under the laws the old holders of water rights can retain their old water rights, but any subsequent applications come under the new law. The flume was held under the old law, and in making the application for this permit to carry the water on down in a pressure pipe, to get more head, we mentioned the point of diversion as the flume, which was the pen stock for the pipe line. The flume itself ran up the creek about a mile. Then about six months ago I discovered that we held part of the system under the old water right; that is, the flume part under the old water right, and the other part, the pipe line, under the new law. So I amended the point of diversion to read at the head of the flume instead of at the foot of the flume.

Q. Why was this deed executed to the Cornucopia Mines Company of New York?

A. Merely to satisfy the State Engineer, to get that on the record.

Q. You did it to satisfy the State Engineer?

A. Yes, sir.

Q. That is the only reason?

A. That was the only reason.

Q. How does it happen that it was executed on the identical day that the deed was made by Col. Wood to the Cornucopia Mines Company of New York?

A. I don't know that it was.

MR. CALLAHAN: Just wait a moment; I want to get that into the record, if it is correct.

A. I don't know that it was.

Q. If your deed was executed on the 20th of November, 1912, to the Cornucopia Mines Co. of New York, and Col. Wood's deed on the 20th of November, 1912, it was the same day, was it not?

A. Yes, sir.

Q. Now, can you give any reason why it was done on these particular dates?

A. Mr. Johns, I never knew the date of Col. Wood's deed. I didn't know until now.

(Trans. of Rec., pages 204, 205 and 206.)

On page 207 of the Transcript of Record Mr. Johns makes the statement that the Master's deed to Col. Wood was executed on November 20, 1912; "as a matter of fact, and the record, this is not true. Ed. Rand, the Master, made his deed as such Master to C. E. S. Wood, as Trustee, on October 8, 1912,

and the same was recorded in Volume 77, page 384, in Books of Deeds in the office of the Clerk and Recorder of Baker County, Oregon, and Wood's deed as Trustee to the Cornucopia Mines Company of New York, the new corporation, was recorded in Book of Deeds of Baker County, Oregon, in the office of the Clerk and Recorder thereof, on October 10, 1912, in Volume 77, page 390."

Q. Did you ever apply to this Court, or did you ever obtain an order from this Court, to construct that power house on the McDonald land?

A. No, sir; that was not constructed by the Receiver.

Q. It was done while you were Receiver, wasn't it?

A. Yes, I was lessee at the same time.

COURT: You didn't construct that as lessee.

A. Yes, sir; that is, I constructed it while I had a lease on it.

Q. Do you mean to say, Mr. Betts, that there is any provision in your lease requiring you to construct a power house on this land, or the McDonald land, at a cost of \$20,000, to use for the benefit of the company?

A. Now, just wait a minute, Mr. Johns, just read the questions.

A. I would like to state that position on that—

COURT: Go on, state your position.

MR. JOHNS: Just a moment, the witness can answer the question and then make any explanation he wants to.

A. All right.

(Question read.)

A. No, there is no provision in the lease.

COURT: What explanation do you want to make?

A. I was going to say that the lease was given me primarily so that I could go ahead and carry on this work with greater expedition, and so that my hands would not be tied. All the men connected with the concern live in New York and they had no head office, and the lease was given to me more with that in view, so that I could go ahead with a free hand.

COURT: Then, you were operating in fact for the lessor?

A. For the company, yes.

COURT: Well, was it the New York company or the Oregon company?

A. No, the New York company. It wasn't a company at that time at all, it was a group.

COURT: And in this case, although you were lessee of these mines by written contract, you were virtually the manager for the New York company.

A. Well, there was no—

COURT: I am asking you if that was a fact.

A. Yes, sir; there wasn't any company.

COURT: But you were the manager?

A. For the men in the East.

COURT: I mean for the company that was to be organized.

A. Yes.

COURT: That is, for the promoters of the company.

A. Yes, sir.

COURT: That was your real position?

A. Yes, sir.

Q. And that company was afterwards organized as the Cornucopia Mines Company of New York?

A. Yes, sir.

Q. Now, Mr. Betts, have you any funds in your possession as Receiver.

A. No, sir.

COURT: You haven't made any report, have you, as to the funds paid into the Court to comply with the sale?

MR. CALLAHAN: No, we are expecting Mr. Betts to make that report now. He hasn't any money; I supposed that was understood.

COURT: Well, there was certain funds to be paid into the Court to pay the costs, until the costs were satisfied and until the claim against the estate which was prior to the mortgage was satisfied under the terms of the sale, and I think a report ought to be made of that to inform the Court what has been done.

MR. CALLAHAN: Oh, yes, I will make that report; but Col. Wood paid the costs and took care of that.

COURT: It ought to have gone through court proceedings so the Court would know.

MR. CALLAHAN: I suppose he will make that report. He attended to that part of it. I wasn't present.

COURT: Has the Master filed his report and does it not contain that information?

MR. CALLAHAN: I don't know that it does in detail, but some how it indicates that it was paid for. Col. Wood has paid it in green backs. I know the Clerk's costs were paid, because he returned me some funds, \$10 or \$12, or such a matter, of the surplus by his check. He did that very recently, within the last few months.

(Trans. of Rec., pages 209, 210, 211 and 212.)

Q. Mr. Betts, while you were in charge of this property as Receiver, what improvements, if any, did you make on that property?

A. Very few as Receiver.

Q. Well, did you make any at all.

A. Not that I remember of now; no, sir.

Q. Didn't you construct a cyanide plant on it?

A. Not as Receiver; no, sir.

Q. Didn't you do it otherwise?

A. I put in other money; yes, sir.

Q. How much did that cyanide plant cost?

A. About \$70,00 or \$80,000.

Q. And what other betterments and improvements did you put on this property during the time you were Receiver?

A. Merely a power house.

Q. What other improvements?

A. None, that I remember now as being of any magnitude.

Q. And when did you first commence the making of these improvements after you were appointed?

A. Not until the spring, the actual work. The improvements were all contemplated and the plans made for carrying on the work in October, 1911.

Q. Do you know about the amount of your expenditures that was made from January, 1912, to the 1st of August, 1912?

A. The total amount you mean.

Q. Yes.

A. I don't know off hand.

Q. Here is a recapitulation of it.

A. \$71,681.27.

Q. What was the amount of your receipts during that period?

A. \$781.81 less than that.

(Trans. of Rec., pages 214 and 215.)

Q. Now, you say this money that was paid to McDonald, you paid to him as Receiver?

A. Yes, sir.

Q. Examine these vouchers. What do those vouchers show?

A. You mean the heading?

Q. Yes.

A. It is stamped "Robert M. Betts, lessee." No, sir; it is not wrong, the Court said I could act in both capacities, as lessee and receiver.

Q. Well, you say you paid this money as receiver.

A. I will show you right here, Mr. Johns—I took the lessee's money.

(Trans. of Rec., page 218.)

MR. JOHNS: Yes, they are vouchers, your honor.

A. You seem to have the impression that we are trying to do something underhanded. I would like to say to you that we were not. Everything has been open and above board as far as possible.

Q. Well, Mr. Betts, we simply want to get these facts in the record, then we will argue the case by-and-by.

A. Well, I would like to show right now that they were carried as one and the same account. When the receivership started \$1,224.90 was the balance I had in the bank and I transferred that to Robert M. Betts, Receiver, and carried it on through the months, until in the end there was a deficit; and because of that deficit I gave the Bishers \$600 of money out of the other funds, because this fund was short.

COURT: You say you gave him \$600?

A. I gave him \$600.

Q. On what account?

A. To help Johnny in the hospital.

Q. After he was hurt, to apply on this judgment?

A. No, sir. No, because there wasn't a thought of a suit. They always claimed it was his own fault,

and there was no suggestion of a suit—nothing like that; and the matter was considered closed, and along in October Mrs. Bisher came up to the mine and she said: “Now, you have said that you would help me in any way you could.” She said: “The time has come. John (her husband) has come to Portland.”

A. “The lawyers want Johnny to bring suit,” and she said, “I don’t want them to bring suit, because, first, I feel it is not fair to you, and, second, I don’t think we can get any money.”

A. Now, as Receiver, this report was all filed, and I supposed the matter was all cleared up, your honor, before any suit was brought, and I told Mrs. Bisher what I would do, and she broke down and cried, and said that was more than she could expect, and she would telegraph John. And the next I knew I was served with papers in the suit.

A. I would like to have things thoroughly understood here. It seems as if I am under fire here as doing something.

(Trans. of Rec., pages 218, 219, 220 and 221.)

Q. Now, Mr. Betts, on what particular piece of land is this power site constructed? Just point out in the deed here.

A. It is constructed on the ground bought from McDonald.

Q. Upon what lands is the cyanide plant constructed?

A. On the old ground, the ground covered by the mortgage.

Q. Can you point out the land, Mr. Betts, would you know?

A. No, this is the same place. The name of the claim is the Phoenix claim.

Q. Now, this power plant was constructed on this land. Where did you get the machinery for that?

A. In San Francisco—San Francisco and New York.

Q. And it was shipped up and put upon this ground during this time?

A. Well, it wasn't erected until the following January, because the machinery was late.

Q. What January?

A. January, 1913.

Q. Now, when this water filing, or permit rather, was obtained from the office of the State Engineer, was their a ditch or flume line then extended?

A. Yes, it was all built. The flume had been there for years.

Q. And you rebuilt it?

A. No, you see, Mr. Johns, the flume came down about a mile down the creek.

(Trans. of Rec., pages 227 and 288.)

QUESTIONS BY MR. CALLAHAN, RE-DIRECT EXAMINATION OF MR. BETTS.

Q. Now, just one more question, Mr. Betts, to make it clear to the Court. You have testified here in relation to certain permanent improvements that were made at various times, which were contem-

plated before the receivership, and some carried on during the receivership and some portions carried on after the receivership.

A. Yes.

Q. Now tell the Court where you got the money to make these expenditures and to pay for those improvements and the machinery specifically.

A. It was sent to me from Mr. Lawrence, and together aggregated up to the 1st of September some \$83,000.

COURT: What year.

A. 1912.

COURT: That was sent to you prior to the receivership and during the receivership?

A. Yes, sir; prior to the receivership and during the receivership, and was deposited in my name as lessee in Spokane, Washington, in a Spokane bank.

Q. You have the checks there?

A. Not all of them. I have part of them.

Q. This fund was checked out for this specific work and was deposited in a Spokane bank?

A. Yes.

Q. Were you in the habit of carrying your account under the receivership and as lessee of the mine?

A. In the Citizens Bank of Baker, Oregon; I did my best, your honor, to keep these separate and straight.

COURT: I have no doubt of that.

A. I thought the matter had been merely cleared

up and that my receivership was awaiting its course on the docket to be discharged.

COURT: Well, it would have been discharged had it not been for this judgment against you as Receiver.

MR. JOHNS: Now, I want to see if we can agree upon the date that this deed was made.

A. If that deed was the 7th of October it was prior to bring the suit.

MR. CALLAHAN: Write it in as a matter of testimony.

MR. JOHNS: All right.

It appears from the records that Ed. Rand, Special Master, in this suit, executed his deed to C. E. S. Wood, Trustee, of the property mentioned and described in the trust deed and mortgage of date October 7, 1912; that the deed was recorded on the 10th day of October, 1912, in Book 77, Records of Deeds of Baker County, Oregon, on page 384 et seq.

ROBERT M. BETTS RESUMED THE STAND AND WAS EXAMINED BY THE COURT.

Q. Mr. Betts, I want to ask you another question. Have you any property in your possession, or has any property come into your possession, aside from what has been transferred by these deeds in question, first by the deed in the foreclosure sale and the deed you have given as Receiver to the New York Company?

A. No, sir. No, nothing; you mean real estate? Have I bought any property?

Q. Well, has any property come into your hands as Receiver?

A. No.

Q. That has not been disposed of?

A. No.

(Trans. of Rec., pages 230, 231 and 232.)

MASTER'S SALE.

The sale, under the decree in this case of April 30, 1912, was made by the Master under that decree and order of sale, and the purchaser thereat, C. E. S. Wood, as Trustee, took the property free from all claims except as therein provided, that he pay a sufficient amount in cash to cover the costs, etc., outside the first mortgage bonds given as the purchase price at the Master's sale.

A purchaser at such a judicial sale can only be held according to its terms. There was no provision in the sale to meet any existing judgments or liens, as, at the time of sale, and prior thereto, there were no judgments, liens or liability against the property.

Hicks v. International & G. N. R. Co., 62 Tex. 41; Beach, receivers, Section 735.

A purchaser at a judicial sale is not liable for the payment of liens as judgments independent of the decree and order of the Court.

Bisher, the Appellee and Intervener herein, did not make the Cornucopia Mines Company of Oregon, C. E. S. Wood, Trustee, or the Cornucopia

Mines Company of New York, parties defendants in his damage suit in which he recovered judgment which he now seeks to satisfy out of the mines company's property. No notice or service of summons or process was served upon any of the foregoing parties in Bisher's damage suit; no suit was pending at the time of sale by Bisher, or any other plaintiff; in fact, the facts upon which Bisher recovered his judgment and the allegations in his complaint did not take place until thirty days subsequent to the sale of the property under the foreclosure proceeding, and the decree of April 30, 1912; there being no suit, judgment or lien against the property at the date of sale and no provision to meet contingent claims or judgments against the property; the purchaser at the Master's sale on June 29, 1912, was not put upon notice. If Bisher, the Appellee, had a prior lien by way of judgment for damages against the Receiver of the Cornucopia Mines Company of Oregon and its property, which was subsequent to the making and execution of the mortgage on the mines, we assert that his lien or judgment would be a junior and inferior lien; and the plaintiff in the foreclosure suit could have made him a party to the foreclosure, and determined the character and legal nature of his lien, if any. If the decree and sale under the foreclosure was set aside and vacated, under the allegations in the Bisher complaint in his damage suit, still Bisher would have no valid lien against the property, as there was an existing valid mortgage, duly executed and recorded, against the mines at the

time and the dates he alleges in his complaint that his action, or the facts alleged, accrued, upon which he seeks to recover.

On this question of first mortgage liens we refer: *Kendall v. McFarland*, 4 Ore., p. 296; *U. S. Investment Corporation v. Portland Hospital*, 40 Ore., 523; *Inverarity v. Stowell et al.*, 10 ore., 261; *Laurent v. Lanning*, 32 Ore., p. 11 and 18; *Farmers Loan & Trust co. v. Ore. Pac. Ry. Co.*, 31 Ore. 237.

Under the Judiciary Act of 1789, the Courts of the United States have uniformly adopted the principles of State jurisprudence on the subject of judgment liens; *Rankin v. Scott*, 25 U. S. 12 (Wheat.), 6 L. Ed., 592.

A prior recorded mortgage is entitled to satisfaction out of the thing it is a mortgage upon, against all subsequent mortgages, liens and judgments.

The judgment set forth in Intervener's petition and application to intervene, does not give Appellee a prior lien in equity, or preference equal to the first mortgage line of the mortgage bond holders. *Miltenberger v. Logansport C. & S. W. R. Co.*, 106 U. S. 286, 27 L. Ed. 117; *Union Trust Co. v. Ill. Midland R. Co.*, 117 U. S. 434, 29 L. Ed. 963; *Porter v. Pittsburg B. S. Co.*, 120 U. S. 649, 30 L. Ed. 860; *Kneeland v. American L. & T. Co.*, 136 U. S., 89, 34 L. Ed. 379; *Morgan, Louisiana & Tex. R. & S. Co. v. Texas Central R. Co.*, 137 U. S. 171, 34 L. Ed. 625.

IN CONCLUSION Appellants say that the Cornucopia Mines Company of Oregon was not a

party defendant in the law case of Bisher against Betts, as Receiver, wherein he recovered judgment; Bisher, Appellee, was not a party to the equity suit of the Hamilton Trust Company v. the Cornucopia Mines Company of Oregon, et al., in the foreclosure proceeding; this latter foreclosure was fully determined and adjudicated by the U. S. District Court for the District of Oregon, and its decree given April 30, 1912, and the property foreclosed thereunder and sold by the Master of said Court appointed for that purpose under the decree on the 29th day of June, 1912, to C. E. S. Wood, as trustee, nearly five months before Bisher, the Appellee, commenced his suit and served summons upon Betts, as Receiver and Defendant.

The Hamilton Trust Co., Appellant, commenced its suit in foreclosure against the Cornucopia Mines Company of Oregon, Laubenheimer & Holmes, as respondents, on December 5, 1911; the injury complained of by Bisher, Appellee, in his petition in intervention herein, is alleged to have occurred on July 28, 1910; so we submit to the Court that their existed no reason in fact, or in law, why Bisher should have been made a party to the Hamilton Trust Company's suit in foreclosure, as his suit, or judgment, or alleged lien, did not exist at that time.

For illustration, suppose Bisher, the Appellee, had a judgment prior to the institution of the Hamilton Trust Company's suit in foreclosure, and the Appellee had been made a party in such suit, his lien, we repeat again, would have been decreed in the fore-

closure action as junior and inferior to the first and paramount mortgage lien of the Hamilton Trust Co.

Respectfully submitted,

EMMETT CALLAHAN and

WOOD, MONTAGUE & HUNT,

Attorneys for Appellants.

The confirmation of a sale adjudged that the purchaser has completed his bid. Thereafter the sale can be set aside for fraud, accident or mistake.

Files v. Brown, 124 Fed. 133, 138-139.

7
No. 2536

In the United States Circuit Court of Appeals

For the Ninth Circuit

HAMILTON TRUST COMPANY,
a Corporation,

Plaintiff and Appellant,

vs.

THE CORNUCOPIA MINES COM-
ANY of Oregon,

Defendant and Appellant,

JOHN L. BISHER, JR., by John L.

Bisher, his Guardian ad Litem,

Intervener and Appellee.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the District Court of the
United States for the District of Oregon.

WOOD, MONTAGUE & HUNT and
EMMETT CALLAHAN,

Attorneys for Plaintiff in Error.

BOOTHE & RICHARDSON,
Board of Trade Building,
and CHARLES A. JOHNS,
Yeon Building.

Portland, Oregon,

Attorneys for Defendant in Error.

Filed

FEB 8 - 1915

F. D. Monckton

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Plaintiff and Appellant,

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Intervener and Appellee.

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Upon Writ of Error from the District Court of the
United States for the District of Oregon.

STATEMENT OF THE CASE.

I.

On the 5th day of December, 1911, complainant Hamilton Trust Company commenced a suit in equity in the District Court of the United States for the District of Oregon against The Cornucopia Mines Company of Oregon, et al., to foreclose a trust deed or mortgage upon certain mining properties lying and being situate in the County of Baker and State of Oregon.

II.

In said suit, and on the 7th day of December, 1911, Hamilton Trust Company filed a motion based upon the bill of complaint, and the affidavit of Emmett Callahan, then attorney for The Cornucopia Mines Company of Oregon, asking for the appointment of a receiver, and based upon such application, the court made an order appointing Robert M. Betts receiver of The Cornucopia Mines Company of Oregon, and on the 2nd day of January, 1912, said Robert M. Betts filed his bond and qualified as such receiver, and entered upon the discharge of his duties.

III.

It appears from the affidavit of said Emmett Callahan:

“That it is necessary that said mines should continue in operation and development; that if said mines were closed down and ceased to be operated and developed, great, irreparable injury and loss would occur by said mines being closed down and not operated; that if said mines are not continued in operation and development, the stamp mill, electric power plant, engines, pumps and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes and other underground openings and workings of said Cornucopia Mining Claims and mines would cave in and be greatly damaged, and great loss follow by the action of the elements and the flooding of said openings in said mine and mining claims filling up with water, deteriorat-

ing, destroying and damaging said mines and mining claims, its buildings and operating plants in a reasonably estimated sum of at least from forty to one hundred thousand dollars."

IV.

That in the order appointing said Robert M. Betts as receiver, the court authorized and directed him to take immediate possession of all and singular the said real and personal property and to continue the operation of the said mining property and every part and portion thereof as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as might be needful and proper in doing so; and that all persons should turn over and deliver to said receiver any and all of said property into his hands and into his control; and further, that out of the moneys which should come into the hands of said receiver from the operation of said property, or otherwise, he should pay the necessary expenses incident to the operation of said property, and hold the remainder, if any there be, subject to the order of the court herein.

V.

On the 30th day of April, 1912, a decree of foreclosure was duly entered in the suit, and it was provided in the decree that the proceeds of such sale should be applied as follows:

“First.

To the expenses of the sale of said property.

Second.

To the expenses of the receivership herein.

Third.

To the costs of this suit.

Fourth.

Complainant's attorney's fees.

Fifth.

Taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.

Sixth.

The balance to the bondholders.

Seventh.

Any amount remaining to The Cornucopia Mines Company of Oregon.”

And the decree further provided: “At the time of the execution of said deed, said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said company; that upon the execution and delivery of the conveyance as aforesaid, the purchaser shall be let into possession of all of the said property.”

VI.

The decree also provides: "That any purchaser of the property at such sale shall be entitled to use and apply, in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of the purchase price should be paid in cash to provide funds for the payment of all costs and expenses incurred," etc.

VII.

On the 29th day of June, 1912, the property was sold under the decree to C. E. S. Wood as trustee for the bondholders under the trust deed or mortgage, and on the 6th day of August, 1912, the court made an order confirming the sale. On the 30th day of August, 1912, Robert M. Betts, as receiver, prepared and filed his report as such, and asked to be discharged. *Such report has never been approved and he has never been discharged as such receiver.* On the 7th day of October, 1912, Ed Rand, special master appointed by the court in the suit, executed his certain deed to C. E. S. Wood, as purchaser and trustee of the bondholders under the trust deed or mortgage, for any and all of the property mentioned and described in Finding No. XII.; and that the said C. E. S. Wood at all such times has been, and is now, one of the attorneys for Hamilton Trust Company, and at all times since the application of John L. Bisher, guardian ad litem, to intervene in this suit was filed, has been and is now one of the attorneys for Robert M. Betts as receiver.

That such deed was filed for record in the office of the County Clerk of Baker County, Oregon, on the 10th day of October, 1912.

On the 20th day of November, 1912, Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, in the suit, executed to The Cornucopia Mines Company of New York, a New York corporation, his certain deed, as such receiver, to that certain water right appropriation, application No. 2056, permit No. 1060 of the State of Oregon.

VIII.

That the receiver never executed any deed to anyone for the property specifically mentioned and described in the decree rendered in the suit, in favor of Hamilton Trust Company and against The Cornucopia Mines Company of Oregon; and that no order was ever petitioned for or made by the court, authorizing or directing the receiver to execute and deliver any deed or convey any property to any person or corporation, unless it was ordered and directed by the decree foreclosing the trust deed or mortgage.

IX.

That on the 20th day of February, 1912, Alexander McDonald executed to The Cornucopia Mines Company of Oregon his certain deed, with full covenants of title, for certain premises which are not mentioned or described in the trust deed or mortgage; and on the 1st day of August, 1912, the said McDonald executed

to the said The Cornucopia Mines Company of Oregon his certain other warranty deed, with full covenants of title, for certain premises which are not described in the mortgage; and that each of said deeds were executed by the said Alexander McDonald after the said Robert M. Betts became receiver and during the time that he was such receiver.

That on the 7th day of October, 1912, the identical day upon which the special master in chancery executed the deed to C. E. S. Wood, as trustee of the bondholders, said C. E. S. Wood, as trustee of the bondholders, executed his deed of the property so conveyed to The Cornucopia Mines Company of New York, which company is not a party to this suit of record.

X.

On the 29th of July, 1912, John L. Bisher, Jr., while in the employ of the receiver of the property, sustained serious personal injuries, and based upon a good and sufficient showing therefor, the judge before whom the cause was tried made an order appointing John L. Bisher guardian ad litem of the said John L. Bisher, Jr., and authorizing the guardian ad litem to commence and prosecute his action. On the 12th day of October, 1912, John L. Bisher, as guardian ad litem of John L. Bisher, Jr., commenced his action in the United States District Court for the District of Oregon, against Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, to recover for the personal injuries alleged to have been sustained by the said John L. Bisher, Jr.

XI.

The action was founded upon the negligence of the receiver in the maintenance, construction and operation of an electric power transmission line leading from the power house of The Cornucopia Mines Company of Oregon to the quartz mill of and on the property of the company; and it was alleged in the complaint that John L. Bisher, Jr., was in the employ of the said receiver and engaged in the construction and repair of such electric power transmission line, and by reason of the faulty construction of the line, and failure to provide a safe place to work, and the neglect to use any device, care or precaution to protect him; and without his fault or neglect, and through the negligence of the receiver, John L. Bisher, Jr., came in contact with electric wires charged with a high voltage and by reason thereof sustained the injuries of which he complains.

XII.

The receiver filed an answer denying liability, and alleging he was operating as lessee, and a trial was had before a jury in said court on the 11th day of April, 1913, and the jury returned a verdict in favor of the said John L. Bisher, as guardian ad litem, and against the said Robert M. Betts, as receiver, for the sum of \$12,500 and judgment was entered on the verdict.

XIII.

No part of the judgment having been paid, on the 13th day of May, 1913, and based upon a petition there-

for, a motion for leave to intervene in the pending suit was filed in said court by the said guardian ad litem. Due and legal service of such motion was made upon Emmett Callahan, attorney for the respondent in said suit, and upon Wood, Montague & Hunt, attorneys for complainant in said suit, on the 13th day of May, 1913.

XIV.

On the 29th day of May, 1913, Emmett Callahan, attorney for the respondent in said suit, filed a motion to dismiss the petition in intervention, and on that date the court made an order overruling such motion to dismiss, and that the said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, be made a party defendant therein as a judgment lien creditor of Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, and directing that the said receiver should show cause, if any, within twenty days, why the judgment obtained by the guardian ad litem should not be paid.

XV.

As directed by the court, on the 20th day of June, 1913, Emmett Callahan, as attorney for The Cornucopia Mines Company of Oregon, filed an answer to show cause, and on the 12th day of December, 1913, a motion was made by the attorneys for the guardian ad litem to strike out parts of the answer to the order to show cause, which motion was served upon the attorneys for Hamilton Trust Company and Robert M. Betts, receiver, and filed on the 12th day of December,

1913. And on the 22nd day of December, 1913, the court made an order to the effect that such motion, in all things and respects "shall be and is hereby sustained;" and in addition thereto made and prepared certain findings, which are set out in full on pages 130 to 145 inclusive of the Transcript of the Record.

XVI.

On the 8th day of June, 1914, attorneys for the guardian ad litem filed a motion to vacate the sale of said property, which was served upon opposing counsel on the 6th day of June, 1914, and filed with the clerk of the 8th day of June, 1914.

XVII.

Thereafter the court made an order directing the receiver to appear and be examined in open court as to his actions under such receivership, and on the 10th day of July, 1914, the receiver did so appear and was examined, and the report of his examination is found on pages 181 to 235, inclusive, of the Transcript of the Record.

The court also made an order directing C. E. S. Wood, as trustee of the bondholders, to make a report of his actions as such trustee, which report is found on pages 245 to 247, inclusive, of the Transcript of the Record.

XVIII.

On the 10th day of July, 1914, the court rendered a decree in this suit, of which finding No. XI., on page 159 of the Transcript of the Record, is as follows:

“That at the time of the injury upon which the judgment against the receiver is based, the said John L. Bisher, Jr., was in the employ of the said Robert M. Betts as receiver, and that the said Robert M. Betts, as receiver, was in the possession of, and operating, maintaining and preserving the property under the orders of this court, and that the claim for such injuries was based upon and arises from and grows out of an operating charge and expenses against the said property under and during such receivership; and as such, the claim of the said John L. Bisher, as guardian ad litem of John L. Bisher, Jr., against Robert M. Betts, as receiver, and the judgment upon which it is based, is superior in right and prior in time to any lien created by the mortgage or deed of trust executed by The Cornucopia Mines Company of Oregon to the said Hamilton Trust Company, as to any and all property specifically mentioned and described in such trust deed or mortgage, and as to any and all property thereafter acquired by the said Robert M. Betts, as receiver, or any property thereafter acquired by the corporation during his receivership, or any improvements or betterments placed thereon.”

Clause No. III. of such decree, found on page 166 of the Transcript of the Record, is as follows:

“A lien is hereby declared in favor of the said John L. Bisher, as guardian ad

litem of John L. Bisher, Jr., for the injuries sustained by the said John L. Bisher, Jr., on the 29th day of July, 1912, and the claim based thereon evidenced by the said judgment, for the amount thereof and costs and accrued interest thereon, and such lien is hereby declared to be and exist upon any and all of the property mentioned and described in said trust deed or mortgage, and on any and all property thereafter acquired by the said The Cornucopia Mines Company of Oregon, or the said Robert M. Betts, as receiver thereof; and that for the payment and satisfaction of said claim and lien, all of the said property is hereby seized, and any and all of said property is hereby declared to be subject to such lien and such claim of the said John L. Bisher, guardian ad litem, and the said lien is hereby declared to be superior and prior in time and right to the said lien created by said trust deed or mortgage on any property conveyed to or acquired by the said The Cornucopia Mines Company of Oregon after the execution of such trust deed or mortgage, and on any and all property conveyed to or acquired by the said Robert M. Betts as receiver thereof; and that any purchaser or purchasers of said property, or any part thereof, took their respective conveyances and acquired any title they may have thereto, subject to the said claim and the said judgment."

XIX.

The decree further ordered (Clause No. IV., found on page 167 of the Transcript of the Record):

"First.

That any and all of said property which was so conveyed to or acquired by the said The Cornucopia Mines Company of Oregon, or the receiver thereof, after the said Robert M. Betts was appointed and qualified as such receiver, as mentioned and described in finding No. II. and findings Nos. IV., V. and VI. of this decree, or such portion thereof as may be necessary, shall be sold as hereinafter provided."

"Second.

Should the proceeds of such sale be not sufficient to satisfy this decree, that any and all of the property mentioned and described in such trust deed or mortgage, and as specifically described in paragraph I. of this decree, shall be sold."

And by such decree a Special Master was appointed with power and authority and directions to make such sale, and to apply the proceeds of such sale:

"(1) To the expenses of the sale of said property.

"(2) To the satisfaction of the said claim and judgment of the said John L. Bisher, guardian ad litem, against Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, and

"(3) That any amount then remaining shall be paid out and distributed upon the further order of this court."

XX.

The report of Ed Rand, special master in chancery, who sold the property, is found on page 67 of the Transcript of the Record, from which it appears:

“The said C. E. S. Wood, trustee, then and there tendered to me in payment of his said bid, six hundred (600) first mortgage bonds of the respondent, The Cornucopia Mines Company of Oregon, numbered from one (1) to six hundred (600), of the par value of five hundred (\$500) Dollars each, or the total principal sum of three hundred thousand (\$300,000) dollars, each bond bearing interest at the rate of 6 per cent per annum and carrying accrued and unpaid interest in the total sum of one hundred and thirty-six thousand (\$136,000) dollars. And I then and there accepted said bonds with the said accrued interest, in full payment and satisfaction of the bid of the said C. E. S. Wood, trustee, and then and there declared to him that I had sold to him as trustee and would convey to him as such trustee, or his assigns, the following described properties, together with all appurtenances thereunto belonging, and all the properties whatsoever, real or personal, of The Cornucopia Mines Company of Oregon, whether specifically described in the following schedule or not.

(Description of property in trust deed or mortgage.)

“I further report that I have delivered to said C. E. S. Wood, trustee, a copy of this report, duly signed by me, as a certificate of sale, and that I hold said bonds to be returned into the registry of this court, or otherwise, as the court may

direct, to be cancelled, and as so cancelled to be re-delivered to respondent, The Cornucopia Mines Company of Oregon, as the purchase price paid by the said C. E. S. Wood, trustee, for the said properties, and as liquidation of the indebtedness of the said The Cornucopia Mines Company of Oregon."

Notwithstanding such report of the special master in chancery, who made the sale, the said C. E. S. Wood, as trustee of the bondholders, on July 17, 1914, filed with the clerk of the court a report that, in addition to the payment of such sums by the delivery of such bonds, he paid cash for the expense of said sale of said property, in full to the date of sale, and the costs of suit and complainant's attorney's fees in full.

XXI.

It appears from the record that the property was sold under the decree to C. E. S. Wood, as trustee of the bondholders, on the 29th day of June, 1912, and the sale was confirmed on the 6th day of August, 1912; that the deed was executed by the special master, under such sale, on the 7th day of October, 1912; that while in the employ of Robert M. Betts, as receiver, John L. Bisher, Jr., was injured on the 29th day of July, 1912; that the guardian ad litem commenced his action on the 12th day of October, 1912; that Robert M. Betts, as receiver, never did execute or deliver any deed to anyone for the property mentioned and described in the decree foreclosing the trust deed or mortgage; that on the 20th day of November, 1912, such receiver did

execute his certain deed to the Cornucopia Mines Company of New York for water right appropriation, application No. 2056, permit No. 1060, of the State of Oregon.

It also appears that the decree provides that, at the time of the execution of the deed by the special master, said receiver should also execute his deed of any and all the property of the company, and that upon the execution and delivery of such deed, the purchaser shall be let into possession of all of the said property.

XXII.

The final report of the receiver has never been approved and he has never been discharged.

Under such facts, the questions presented by the record are:

First.

Did the purchaser comply with the terms and provisions of the decree under which the property was sold;

Second.

Does John L. Bisher, guardian ad litem, by virtue of his judgment against the receiver, have a lien upon the property sold under the decree which is prior in right and time to the mortgage or trust deed;

Third.

Is the judgment a lien upon property which was acquired by the receiver during the receivership, which is not mentioned or described in the trust deed or mortgage; and

Fourth.

Did the court have jurisdiction to make the Findings of Fact and render the decree from which this appeal is taken?

ANSWER TO SPECIFICATIONS OF ERROR.

I.

The court did not err in permitting the guardian ad litem to intervene in the original suit, and had jurisdiction to grant such order; and the matters and things involved in said suit were not fully or finally determined or closed by the decree of April 30, 1912, and the court or judge were not without jurisdiction to make or grant the decree of July 10, 1914.

II.

The court did not err in overruling or denying complainant's motion to dismiss and disallow the petition in intervention filed by the intervener on May 4, 1913.

III.

The court did not err in sustaining or allowing the motion made and filed by the intervener on the 12th day of December, 1913, dismissing and disallowing the answer of complainant filed on June 20, 1913, and the court and the judge did not exceed their jurisdiction and did not err in making and granting said order of date December 22, 1913.

IV.

The court did not err in rendering its decree on July 10, 1914, and ordering the property seized for the satisfaction of the judgment in favor of John L. Bisher, guardian ad litem, or in decreeing it to be a lien, based upon such claim and judgment, superior and prior in time and right to the lien created by the trust deed or mortgage on any property acquired by the receiver during the receivership.

POINTS AND AUTHORITIES.

I.

The trust deed or mortgage was executed by the special master in chancery to C. E. S. Wood, trustee of the bondholders, on October 7, 1912; and the decree under which the property was sold provides:

“At the time of the execution of said deed, said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said company; that upon the execution and delivery of the conveyance, as aforesaid, the purchaser shall be let into possession of all of the said property.”

II.

On November 20, 1912, Robert M. Betts, receiver, without an order of the court therefor, executed his deed to The Cornucopia Mines Company of New York for

the water right appropriation, permit No. 1060, application No. 2056 to the State of Oregon, made by him on the 3rd day of February, 1912. No other deed was executed by the receiver.

III.

On the showing and petition of Hamilton Trust Company, and with the consent of The Cornucopia Mines Company of Oregon, Robert M. Betts was appointed receiver to operate and preserve the property, and qualified on the 2nd day of January, 1912, after which the property of the corporation was *custodia legis*.

Thompson on Corporations, 2nd edition, volume 5, p. 1188, section 6372; page 1190, section 6373; page 1193, section 6375.

High on Receivers, 4th edition, page 7, section 4.

IV.

John L. Bisher, Jr., sustained his injuries while in the employ of the receiver, then in the possession and operation of the property, and his claim for such injuries accrued while the property was *custodia legis*, and is a prior lien upon such property.

Robinson vs. New York & S. I. Electric Co., 99 Appellate Division, 509, 91 N. Y. Supplement, 153; cited in the notes in 41 L. R. A. (N. S.), p. 700;

High on Receivers, 4th ed., sec. 36, page 49, and authorities cited;

Heisen vs. Binz, 147 Indiana, 284 (45 N. E. 104);

High on Receivers, 4th ed., sec. 394b, page 504;

Knickerbocker, et al., vs. McKindley Coal Mining Co., 172 Illinois, 535 (50 N. E., 330);

Thompson on Corporations, 1st ed., vol. 5, sec. 7151, page 5672;

Vandalia Ry. Co. vs. Keys (Indiana), 91 N. E., 173-175;

Houston & Texas Cent. R. Co. vs. Crawford, 31 S. W., 176;

Knickerbocker vs. Benes, 195 Illinois, 434;

Thompson on Corporations, 2nd ed., vol. 5, page 1257, sec. 6457;

High on Receivers, 4th ed., page 336, sec. 286a.

V.

The court did not have authority to set aside the sale or the confirmation or the deed, but did have authority to order another sale of the property to satisfy Bisher's lien.

Farmers' Loan & Trust Co. and Elijah Smith, Receiver and Trustee, vs. Henry L. Newman, 127 U. S., 649 (Book 32 L. C. P. Co., 303.)

VI.

The court's findings on December 22, 1913, were made "from the records, files and proceedings in this suit," and the supplemental findings and decree of July 10, 1914, were made and rendered after taking the testimony of Robert M. Betts, receiver, and after "having heard the arguments and statements of counsel for the respective parties, and having read and examined the records, files and proceedings in this suit."

VII.

During his receivership, as appears from his report, the receiver placed betterments and improvements on the property of the value of \$12,714.26, and as appears from his testimony, acquired the lands on which the power house was constructed, and constructed the power plant thereon, of the value of \$20,000, and constructed a pipe line of the value of \$10,000, and installed a cyanide plant of the value of \$70,000 or \$80,000, and made an application, and was granted a permit, for a water right from the State of Oregon; and appellee's claim would be a prior lien upon any and all property so acquired and constructed, and upon any betterments or improvements made on the property during the receivership. (See authorities above cited.)

ARGUMENT ON MOTION TO DISMISS APPEAL.

By whom and for whom is this appeal taken? It appears from the record that the trust deed or mortgage was executed by The Cornucopia Mines Company of Oregon to the Hamilton Trust Company, a New York corporation, in 1905, to secure an authorized bond issue of \$300,000, and that the bonds were issued and sold; and, for failure to pay interest, at the instance and request of the bondholders, the Trust Company brought suit to foreclose, in which it applied to the court for a receiver. A decree was rendered, which, among other things, provided:

“That the purchaser or purchasers of said mortgaged property at such sale shall be entitled to use and apply in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of the purchase price should be paid in cash to provide funds for payment of all costs and expenses incurred herein,” etc.

It appears from the report of the sale, made by the special master in chancery, that C. E. S. Wood, as trustee for the bondholders, bid the sum of \$432,000, etc., and that:

“The said C. E. S. Wood, trustee, then and there tendered to me in payment of his said bid, six hundred (600) first mortgage bonds of the respondent, The Cornucopia Mines Company of Oregon,

numbered from one (1) to six hundred (600), and of the par value of five hundred (\$500) dollars each, or the total principal sum of three hundred thousand (\$300,000) dollars, each bond bearing interest at the rate of 6 per cent per annum and carrying accrued and unpaid interest in the total sum of one hundred and thirty-six thousand (\$136,000) dollars. And I then and there accepted said bonds with the said accrued interest in full payment and satisfaction of the bid of the said C. E. S. Wood, trustee," etc.

And it appears from the decree:

"That there is now due and owing to the complainant as trustee from said respondent, The Cornucopia Mines Company of Oregon, on account thereof, said sum of \$300,000, with interest thereon at the rate of 6 per cent per annum, payable semi-annually, from the 1st day of October, 1905, and the further sum of \$1,192.93, taxes paid by the complainant, as provided by the terms of said mortgage, upon the property covered thereby, with interest thereon from the 15th day of March, 1912, the date of said payment, at the rate of 6 per cent per annum, and the further sum of \$10,000, which is by the court adjudged to be a reasonable sum to be allowed as attorney's fees for the benefit of the complainant herein."

And it appears from the report of C. E. S. Wood, trustee:

"That at said sale, as aforesaid, I, C. E. S. Wood, as trustee, became the purchaser of said described real and personal property for the sum of \$432,000, and

delivered to the said special master of this court the first mortgage bonds in the sum of \$300,000 and accrued interest on said bonds in the sum of \$136,000, as provided and decreed by this court in its said decree of April 30, 1912, in the above entitled suit, and that in addition to the payment of the foregoing sums, I paid cash expenses of said sale of said property in full to date of sale and costs of this suit and complainant's attorney's fees in full."

It thus appears that any and all bonds which were issued to Hamilton Trust Company under the trust deed or mortgage have been fully paid, surrendered and cancelled, and the costs and attorney's fees are satisfied in full. What interest does Hamilton Trust Company now have in this proceeding? What interest does Hamilton Trust Company now have in the property mentioned or described in the trust deed or mortgage? What interest does Hamilton Trust Company now have in any one or either of the bonds issued under such trust deed or mortgage? Why should Hamilton Trust Company seek to defeat the payment or collection of Bisher's claim or judgment? Bisher's claim or judgment is not a claim against Hamilton Trust Company.

Bisher's judgment is against Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, and based upon his judgment against the receiver, Bisher is seeking to enforce an equitable lien upon the property which was acquired by the receiver during his receivership, and upon the property which was mentioned and described in the trust deed or mortgage to

the Hamilton Trust Company. Such a proceeding could not and does not concern the Hamilton Trust Company, for the reason that it no longer has any interest in such property, and any and all of the bonds which were secured by and issued under such trust deed have been surrendered and cancelled.

An appeal was taken by the receiver from the Bisher judgment, and its validity was sustained and the judgment was affirmed in an opinion rendered by his honor, Judge Gilbert, in this court last May. The judgment against the receiver is valid and binding, not only as to the receiver, but as to The Cornucopia Mines Company of Oregon for any of its remaining property. The Cornucopia Mines Company of Oregon cannot dispute the validity or the binding force and effect of the judgment against the receiver.

While it is true that the decree from which this appeal is taken was rendered in a suit *in* and to which Hamilton Trust Company was a party, it is also true that no decree of any kind was rendered *against Hamilton Trust Company*. Neither was any *decree* rendered against *The Cornucopia Mines Company of Oregon* or *Robert M. Betts, receiver*. The substance and legal effect of the decree is to make Bisher's claim an equitable lien up the *property* specifically mentioned and described in the trust deed or mortgage executed by The Cornucopia Mines Company of Oregon to Hamilton Trust Company, and upon any property acquired by the *receiver during the receivership*, and directing said property to be sold and the proceeds applied to the payment of such equitable lien, and that such equitable

lien is prior in right to the lien created by such trust deed or mortgage.

It appears from the record that on the 7th day of October, 1912, the special master in chancery, pursuant to the terms of the original decree, executed his deed of the property mentioned and described in the mortgage to C. E. S. Wood as trustee for the bondholders, and that concurrent with the execution of such deed, the said C. E. S. Wood, as trustee, executed his certain deed of the same property to The Cornucopia Mines Company of New York, and that on November 20, 1912, the receiver, *without the knowledge or an order of court*, executed to The Cornucopia Mines Company of *New York* his certain deed of the permit for the water right from the State of Oregon. No other conveyances have ever been made.

The Cornucopia Mines Company of *New York* is not a party to this suit or proceeding. No decree of any kind was rendered against the Hamilton Trust Company. No decree of any kind, not even for costs, was rendered against The Cornucopia Mines Company of Oregon or Robert M. Betts, receiver, the remaining parties to the suit. The decree simply adjudges that Bisher has a prior equitable lien, and that the property be sold and the proceeds of the sale be applied to the payment of such equitable lien; no more, no less. In other words, it is a decree *in rem* against property which, on the 7th day of October, 1912, was conveyed to The Cornucopia Mines Company of *New York*, which company is not a party to this suit or this decree.

Under the order of the court, Robert M. Betts was appointed as receiver of any and all of the property of The Cornucopia Mines Company of Oregon, and under the record the court is now in possession and control, through its receiver, of any property which was acquired by the receiver during his receivership, and any property which was acquired by The Cornucopia Mines Company of Oregon after the appointment of such receiver. The claim or judgment of Bisher as against the receiver is *final* and the receiver *has not been discharged*; and, as to any property which was not conveyed under the original decree rendered in favor of Hamilton Trust Company, Bisher's claim would be a good and valid lien, and the decree from which this appeal is taken did not add to or take from the force or effect of that lien. Hence, we contend that Hamilton Trust Company has no interest in the decree which makes Bisher's claim an equitable lien upon the property conveyed to the bondholders, and that neither the receiver nor The Cornucopia Mines Company of Oregon have any legal right to question the validity of such decree, and that the *only purpose* and *intent* of *this appeal* is to ascertain and determine, for the *use and benefit* of The Cornucopia Mines Company of *New York*, the validity of its title to the property mentioned and described in the trust deed or mortgage to Hamilton Trust Company, and for such reason the appeal should be dismissed.

What legal right has Hamilton Trust Company to appeal from the decree in favor of Bisher? What interest has it in the property upon which Bisher's claim

is adjudged an equitable lien? How is it affected by such decree? The *receiver has not appealed from such decree*, and what legal right has The Cornucopia Mines Company of Oregon to appeal from such decree? The decree provides:

“That a lien is hereby created in favor of the said John L. Bisher, as guardian ad litem of John L. Bisher, Jr., for the injuries sustained by the said John L. Bisher, Jr., on the 29th day of July, 1912, and the claim based thereon evidenced by the said judgment, for the amount thereof and costs and accrued interest thereon, and such lien is hereby declared to be and exist upon any and all of the property mentioned and described in such trust deed or mortgage, and on any and all property thereafter acquired by the said The Cornucopia Mines Company of Oregon, or the said Robert M. Betts as receiver thereof; and that for the payment and satisfaction of said claim and lien, all of the said property is hereby seized, and any and all of said property is hereby declared to be subject to such lien and such claim of the said John L. Bisher, guardian ad litem, and the said lien is hereby declared to be superior in time and right to the said lien created by said trust deed or mortgage, and on any property conveyed to or acquired by the said The Cornucopia Mines Company of Oregon after the execution of such trust deed or mortgage, and on any and all property conveyed to or acquired by the said Robert M. Betts as receiver thereof; and that any purchaser or purchasers of said property or any part thereof, took their respective conveyances and acquired any title they may have

thereto, subject to the said claim and to the said judgment."

That is not a decree against Hamilton Trust Company; that is not a decree against The Cornucopia Mines Company of Oregon, and that is not a decree against Robert M. Betts, receiver. It is a decree against the property and the property only, and it appears from the record that Hamilton Trust Company has no right, title or interest whatever in the said property, and that *Bisher's judgment against the receiver is final*; and hence we say that neither of the parties to this proceeding have any legal right to prosecute such an appeal, and that it is taken for the use and benefit only of The Cornucopia Mines Company of New York, which is not a party to this suit, and the appeal should be dismissed.

ANSWER TO AND CORRECTIONS OF APPELLANTS' BRIEF.

I.

On page 16 of their brief appellants call attention to sections 3, 4, 6 and 7 of the report of Robert M. Betts, as lessee and receiver of the Mines Company, and that it appears from such report that he held and operated said mines under a written lease with the company from the 1st day of November, 1911, until the 1st day of November, 1912. This report was filed with the clerk on the 30th of August, 1912, and in the action at law of Bisher against the receiver, the question of his

operation under a lease was plead in his answer, and, notwithstanding such plea, the jury found that he was *operating as receiver* and judgment was rendered against him as *receiver*, and that judgment was affirmed upon appeal to this court, and is now final.

II.

On page 19 they quote the statute of Oregon upon the right of the purchaser at a sale. Nobody questions that law or the authorities cited under it, but it has nothing to do with this case. The foreclosure decree specifies when the purchaser shall have possession, and that he shall have such possession when the deed is executed by the special master in chancery, and that deed was executed on the 7th day of October, 1912; and with all due respect to counsel, there is no testimony or evidence in the record that the purchaser under the decree "immediately on the day of sale took possession of said property under the decree and the foregoing statute, and from the day of sale by operation of law, and as a matter of law, was in possession thereof; the purchaser's title and ownership vesting therein from the date of sale as a matter of law." The statute says: Such purchaser "shall be entitled to the possession of the property purchased or redeemed."

While in the absence of the decree the statute gives the purchaser the *right* to possession, the fact that he has a *right* to the possession of the property is no evidence of the fact that he *took* possession of the property, and under no circumstances in this case could the purchaser take, or would he be entitled to take, possession

of the property except under the terms and conditions of the decree, which provides: "That upon the execution and delivery of the conveyance or conveyances aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into the possession of all of the said mortgaged premises or property so conveyed to him or them, etc.," and when counsel say that "The purchaser thereat immediately on the day of sale took possession of said property under the decree, etc.," such statement is in conflict with the record and the decree, and is merely an assumption of fact which does not exist.

Again, the receiver did not surrender possession, but must have retained possession, for it appears from his written report filed on August 30, 1912, that he received bullion and concentrates, \$10,258.98, and expended in the operation of the property, \$7,753.74 in the month of July, 1912, and we are at a loss to understand why appellants' counsel should claim or assert that Mr. Wood, as trustee for the bondholders, took possession of the property on the 29th day of June, 1912, the date of the sale, or how he could take possession at any time prior to the 7th day of October, 1912, the date of his deed from the special master; and, as a matter of fact, there is nothing in the record which shows, or tends to show, that he took possession even on that date, or at any other time, or that the receiver has ever surrendered possession to anyone at any time.

On page 40 of appellants' brief counsel say: "The receiver was not in possession or operating the property upon which the alleged injury took place on the 28th

day of July, 1912, as the property was then in the hands of C. E. S. Wood, as purchaser under the sale that took place on June 29, 1912."

We are at a loss to understand why counsel would continue to make such statement. As stated, the judgment is against the receiver, and all such questions were litigated in the action in which the judgment was rendered; and it appears from the receiver's own report, page 86, Transcript of Record, that he operated the property for the month of July, 1912, and such statement is based upon the legal conclusion of counsel and is not sustained by anything in the record.

III.

With all their diligence the able counsel have only cited one case which seems to sustain their position—*Peterson White vs. The Keokuk & Des Moines R. Co.*, 2 N. W., 556, and the principles laid down in that decision are in direct conflict with all recent decisions, both state and federal, and the text books on receivers. It is a matter of common knowledge among attorneys that there has been a marked change in recent years in the law on questions of receivership, and, in particular, where the receiver, at the instance and request of bondholders, has been appointed to operate property pending the suit, and the principles laid down in that decision are no longer the law. And, again, there is a marked distinction between the facts in that case and the case at bar.

Counsel say: "It seems to be well established in the operation of railroads under receivership that per-

sonal injuries to employes are considered part of the operating expenses, and are entitled to payment as such out of the earnings of the property, but cannot be satisfied out of the corpus of the property," and among other authorities cite 41 L. R. A. (N. S.), 700 and 702.

In the footnotes of that case, on page 700, it is said:

"It seems to be pretty well established that claims for damages arising *before* the appointment of a receiver, for either a steam or street railway company, are entitled to no preference over secured creditors. Thus, where torts were committed in the operation of a system of street railroads shortly prior to the receivership, claims for damages were denied priority over mortgage liens, and held rank with general unsecured claims." Citing the identical authorities in appellants' brief.

Counsel have not found and will not be able to find any authority sustaining their position on that point. In this case Bisher sustained his injuries while in the employ of the receiver, and there is a marked distinction between a claim for injuries *before* a receivership and *during* a receivership, which counsel seem to have overlooked in their citation of authorities on that point.

IV.

On page 43 in their brief appellants' attorneys say: "The mortgage foreclosed by appellant's bill in the suit provided that after acquired property and all improvements thereafter placed upon the same was to become part of the mortgaged property under the mortgage given." Property was acquired by the corporation and

the receiver after the sale, and which is not mentioned or described in the deed which was executed by the special master. How, and upon what theory, can the purchaser now claim title to property which was not mentioned or described in the decree and which was not sold? If any after acquired property was mentioned and described in the decree, there would then be merit in counsel's contention, but the purchaser has neither a legal nor an equitable claim to any property which was not mentioned or described in the decree.

The court did not order or direct a *re-sale* of the property, but it did decree that Bisher had an equitable lien for the amount of his claim, which was prior in time and right to the bondholders, and directing that the property be *sold to satisfy such lien*. This is not a proceeding to set aside the former decree or any sale under such decree. It is a proceeding to declare that Bisher has an equitable lien on the property for the amount of his claim, which is prior in time and right to any purchaser under the foreclosure decree, and the decree gives Bisher such an equitable lien and directs that the property be sold and the proceeds of such sale be applied to the satisfaction of Bisher's claim or judgment; and that the purchaser at such sale acquires a title superior in right and prior in time to the title of the purchaser under the foreclosure decree.

From an examination of the authorities cited by appellants' counsel, which seem to be in point on the legal questions involved in this case, it will be found that they are old and early decisions, the principles of which have been overruled by recent and later decisions.

ARGUMENT ON THE MERITS.

It appears from the record that on April 1, 1905, The Cornucopia Mines Company of Oregon executed its certain trust deed or mortgage to and in favor of Hamilton Trust Company, of New York, on the property described in such trust deed or mortgage, to secure the payment of six hundred bonds of the par value of five hundred dollars each, with interest thereon at the rate of six per cent per annum; and for failure to comply with the terms and conditions of such bonds, the Trust Company commenced a suit, in the Federal Court at Portland, to foreclose such trust deed or mortgage, and in such suit, based upon the showing and petition therefor, the complainant therein applied to the court for the appointment of a receiver; it appearing from such showing and petition for the appointment of a receiver:

“That it is necessary that said mines should continue in operation and development; that if said mines were closed down and ceased to be operated and developed, great, irreparable injury and loss would occur by said mines being closed down and not operated; that if said mines are not continued in operation and development, the stamp mill, electric power plant, engines, pumps and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes and other underground openings and workings of said Cornucopia mining claims and mines will cave in and be greatly damaged and great loss follow by the action of the elements and the flooding of said openings in said mine and mining claims filling up with water, deteriorating, de-

stroying and damaging said mines and mining claims, its buildings and operating plants, in a reasonably estimated sum of at least forty to one hundred thousand dollars."

Based upon such showing and petition, the court made an order for the appointment of a receiver of the property covered by the mortgage sought to be foreclosed, and, among other things, said order provided:

"That said receiver do, and he hereby is, authorized and directed to take possession of all and singular the said real and personal property, wherever situated or found, and to continue the operation of said mining and other property and every part and portion thereof, as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so."

Also:

"Each and every of the officers, directors, agents or employes of The Cornucopia Mines Company of Oregon, and all other persons or corporations, are hereby commanded to turn over and deliver to said receiver any and all of said property into his hands, or into his control, and every of such officers, directors, agents, employes, persons or corporations, are hereby commanded to obey and conform to such orders as may be given to them from time to time by such receiver, in conducting the operations of said property and discharging his duties as such receiver."

And under the said order the court appointed Robert M. Betts as such receiver, and he qualified and entered upon the discharge of his duties as such receiver, under such order, on the 2nd day of January, 1912, and at all times since has been, and is now, such receiver.

On the 30th day of April, 1912, the court rendered a decree foreclosing the said mortgage or deed of trust, and directing the sale of said premises, and appointed Ed Rand special master for said purpose. The decree, among other things, provides that the proceeds of such sale shall be applied as follows:

“1. To the expenses of the sale of said property.

2. The expenses of the receivership herein.

3. The costs of this suit.

4. Complainant's attorneys' fees.

5. The taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.

6. The amounts due or to become due upon the bonds secured by the said mortgage, and in case such proceeds shall be insufficient to pay in full the whole amount of principal and interest so due and unpaid on such bonds, then the proceeds shall be applied ratably upon the whole amount due, according to the aggregate thereof, without preference or priority of any part over any other part thereof.

7. The remainder, if any, to respondent The Cornucopia Mines Company of Oregon, its successors and assigns."

Also:

"That upon the completion and confirmation of any sale made under and in pursuance of this decree, unless said property shall be redeemed as by law provided, as aforesaid, shall make, execute and deliver to the purchaser or purchasers of the said property a good and sufficient deed of conveyance thereof in fee simple, which deed shall specify the property so conveyed and the sum paid therefor, and that said respondent, by its proper corporate officers, join in the execution of said deed."

Also:

"At the time of the execution of said deed the said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said The Cornucopia Mines Company, a corporation, or any interest therein, vested or standing in the name of the receiver, or to which said receiver has acquired any title or interest. That upon the execution and delivery of the conveyance or conveyances as aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into the possession of all of the said mortgaged premises or property so conveyed to him or them."

Under the terms and conditions of such decree, the said property described in the trust deed or mortgage was sold by the said Ed Rand on the 29th day of

June, 1912, to C. E. S. Wood, trustee for the bondholders, for the sum of \$432,000, and it appears from the report of the said Ed Rand that:

“The said C. E. S. Wood, trustee, then and there tendered to me in payment of his said bid, six hundred (600) first mortgage bonds of the respondent, The Cornucopia Mines Company of Oregon, numbered from one (1) to six hundred (600), of the par value of five hundred (\$500) dollars each, or the total principal sum of three hundred thousand (\$300,000) dollars, each bond bearing interest at the rate of 6 per cent per annum and carrying accrued and unpaid interest in the total sum of one hundred and thirty-six thousand (\$136,000) dollars. And I then and there accepted said bonds with the said accrued interest, in full payment and satisfaction of the bid of the said C. E. S. Wood, trustee, and then and there declared to him that I had sold to him as trustee and would convey to him as such trustee, or his assigns, the property (mentioned and described in such trust deed or mortgage).”

“I further report that I have delivered to said C. E. S. Wood, trustee, a copy of this report, duly signed by me, as a certificate of sale, and that I hold said bonds to be returned into the registry of this court, or otherwise, as the court may direct, to be cancelled, and as so cancelled to be re-delivered to respondent, The Cornucopia Mines Company of Oregon, as the purchase price paid by the said C. E. S. Wood, trustee, for the said properties, and as liquidation of the indebtedness of the said The Cornucopia Mines Company of Oregon.”

On the 6th day of August, 1912, the court made an order confirming the sale "and the acceptance by said Rand of said bonds and interest as full payment of the said bid by C. E. S. Wood, trustee, is hereby approved, etc."

No deed was executed by Special Master Rand of the property sold until the 7th day of October, 1912, at which time the special master did execute a deed of the property sold to the said C. E. S. Wood, as trustee for the bondholders; and on the same date, the said C. E. S. Wood, as such trustee, executed his deed of the same property to The Cornucopia Mines Company of New York. On November 20, 1912, Robert M. Betts, as receiver, executed to the said The Cornucopia Mines Company of New York his certain deed to that certain water right appropriation made by him, as such receiver, application No. 2056, permit No. 1060, State of Oregon. No other deed was ever executed to anyone by the receiver of any other property.

On July 29, 1912, John L. Bisher, Jr., a minor, was in the employ of Robert M. Betts as receiver, who was then in possession and operation of all of the property of The Cornucopia Mines Company of Oregon, and while in such employ, and at work in the construction and repair of the high tension electric line leading from the mill to the power house of the defendant company, he sustained serious personal injuries; and upon application to the trial court, his father, John L. Bisher, was appointed his guardian ad litem to commence and prosecute an action to recover for such injuries, and on the 12th day of October, 1912, such action was commenced

against Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon.

The receiver filed an answer denying all liability, and a trial was had and the jury returned a verdict against the receiver for the sum of \$12,500. Judgment was entered on the verdict and an appeal was taken to this court from such judgment, and in an opinion rendered by Judge Gilbert, in May, 1914, the judgment was affirmed, and is now in full force and effect.

The judgment was rendered against the receiver, and we contend that, at the time of the injury to John L. Bisher, Jr., the property was *custodia legis*, and so remained until the 7th day of October, 1912, the date of the execution of the deed by the special master to C. E. S. Wood, as trustee for the bondholders, and that such claim, if not otherwise paid, is a charge or lien upon the corpus of the property.

No deed was ever executed by the receiver for any property except the water right, and that deed was executed on the 20th day of November, 1912, and the action on which the judgment is founded was commenced on October 12, 1912.

This receiver was appointed by the court at the special instance and request of Hamilton Trust Company, and upon the showing and petition that it was necessary that the property should continue to be operated for its preservation. We will frankly concede that, if the sale had been confirmed and the deeds properly executed, and the receiver had surrendered possession prior to the time that young Bisher sustained his injuries, we would not have a cause of action against the

receiver, and that another and a different question would be presented.

Can the bondholders who have secured the appointment of a receiver to operate and preserve the property refuse to pay the expenses of such operation, and disclaim any liability for injuries sustained by an employe engaged in such operation? We say no. Some one should compensate him for the injuries which he sustained while in the employ of the receiver.

It appears from the record that the receiver does not, and never did, have any funds with which to pay such claim. It also appears from the record that the lower court gave the Hamilton Trust Company sixty days in which to pay or cause the claim to be paid, and the only recourse left was to make it a charge or lien upon the corpus of the property.

Can it be said that a court, which, through its receiver, has in its possession and under its control property of the admitted value of \$432,000, does not have the legal right or authority to enforce the payment of a claim for injuries which were sustained by an employe of the receiver who was engaged in the operation of the property under an appointment made at the request of the bondholders, who became the purchasers of the property? We say no.

If Bisher's claim or judgment cannot be collected from the corpus of the property, by whom will it be paid and from whom can it be collected? The receiver has no funds. The property described in the trust deed or mortgage of The Cornucopia Mines Company of Oregon was sold to pay the bonds which were held by

the bondholders, and was bid in by the trustee for the bondholders.

It appears from the report of the said master in chancery that he took and accepted bonds, and bonds only, for the sale of the property, and it appears from the report of Mr. Wood, as trustee for the bondholders, that he paid the costs of sale and the attorney's fees; but it does not appear from either report that a single dollar was ever paid by the purchaser for the expenses of the receivership. It does appear from the decree which was rendered in the foreclosure suit that the proceeds of the sale should be applied (1) to the expenses of the sale; (2) to the expenses of the receivership; (3) the costs of the suit; (4) complainant's attorney's fees, and it was under such decree that the property was sold.

Under his report, no money whatever was paid to the special master. From the report of Mr. Wood, as trustee, it appears that "I paid cash expenses of said sale of said property in full to date of sale; the costs of this suit and complainant's attorney's fees in full," and the decree provides that the proceeds of the sale should be applied; second, to the expenses of the receivership; third, to costs of this suit; fourth, complainant's attorney's fees; and, among other things, the foreclosure decree provides:

"That the purchaser or purchasers of said mortgaged property at such sale shall be entitled to use and apply, in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of the purchase price should be paid in cash to provide funds

for payment of all costs and expenses incurred herein, and that the master return the cash proceeds of said sale to the clerk of this court and that the same be paid to the clerk of this court, and upon the completion and confirmation by this court of the sale made under and in pursuance of this decree, said clerk of this court shall pay out such moneys as follows:” * * *

We concede that Bisher did not sustain his injuries until after the sale, but he did sustain his injuries prior to the confirmation, and he did sustain his injuries while the property was in the possession of the receiver under the decree and the order of the court; and the receiver was appointed upon the showing and petition of Hamilton Trust Company, complainant, in a suit for and in behalf of the bondholders, to foreclose the trust deed or mortgage, and the property was sold to Mr. Wood as the trustee for such bondholders.

All of such matters appear of record, and yet the receiver has no funds with which to pay Bisher's claim. The property of the company has been sold; the Hamilton Trust Company refuses and neglects to pay such claim; the bondholders disclaim any liability, and appellants are now contending that Bisher has no redress, and that he should not be compensated for the injuries which he sustained.

The original proceeding was a suit in equity, in which the Hamilton Trust Company applied to the court for certain relief. The court had jurisdiction of the parties to the suit and the subject matter of the suit, and, through its receiver, the property was *custodia legis*, and the property described in the trust deed or

mortgage, by the terms and provisions of the decree under which it was sold, remained *custodia legis*.

The receiver was appointed upon the petition and showing of Hamilton Trust Company, and through its receiver, the Trust Company had legal knowledge of Bisher's injuries prior to the confirmation of the sale. The trustee for the bondholders did not acquire title to the property until the 7th of October, 1912, the date of the execution of the deed by the special master in chancery, and the decree, in legal effect, provides that the property should be in the possession of the receiver until the execution of that deed; and when the bondholders took title to the property under that deed, they took such title *cum onere* Bisher's claim.

If the receiver had not been appointed on the showing and petition of the Trust Company, for and in behalf of the bondholders, and if the property had not been sold to Mr. Wood, as trustee for the bondholders, another and a different question would be presented.

Our views as to the law of this case are well expressed by the court in the case of *Robinson vs. New York & S. I. Electric R. Co.*, 99 Appellate Division 509, 91 N. Y. Supp., 153, cited in 41 L. R. A., N. S., page 700, and cited by appellants' counsel, in which the court says:

"When the court took into its possession the property of the defendant, and undertook to continue the plant in operation for the benefit of judgment creditors, it did so subject to the same risks which would attach to the corporation if it continued to exercise its franchises; and among these risks was that of personal in-

juries to employes through the negligence of the agent or servants of the court. It could not continue the operation of the plant, and deny to those injured through its negligence a remedy, so long as the property in the hands of the court was adequate to discharge the obligation, for it would be a gross injustice to hold that the rights of the injured employe could be made secondary to those of creditors in whose behalf the plant was being operated; that they could take some portion of his rights and apply them to the payment of their debts. While it is true that claims for injuries occurring before the receivership are not commonly allowed a preference over the claims of others, we know of no case which is controlling here which has asserted the doctrine that creditors or holders of receivers' certificates can be preferred over the claims of those who have suffered injury through negligence while the plant was in the control of the receiver for the benefit of the creditors. On the contrary, the rule is established by authority, that damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employes, are passed as operating expenses, and are accorded the same priority of payment as belongs to other necessary expenses of the receivership. Such claims are paid out of the net income if that is sufficient, but in the event of a deficiency, they will be paid out of the corpus. Such claims, therefore, have priority over mortgage debts, or other debts existing when the action was brought in which the receiver was appointed."

In the pending case the receiver was appointed at the instance and request of Hamilton Trust Company, acting for and on behalf of the bondholders, and at the time Bisher sustained his injuries was in possession and operation of the property, and when the property was sold, it was sold to Mr. Wood, acting as trustee for the bondholders. That is to say, that at the time Bisher sustained his injuries, the receiver was in the possession of and operating the property for and on behalf of the bondholders, and continued in such possession and operation for and on behalf of the bondholders until the 7th day of October, 1912, when Mr. Wood, as trustee for the bondholders, executed his deed of the property to The Cornucopia Mines Company of New York.

The Cornucopia Mines Company of New York has not appeared in, and is not a party to, this proceeding. The only parties of record to this proceeding are Hamilton Trust Company, The Cornucopia Mines Company of Oregon and Robert M. Betts as receiver of that company.

While it is true that, on August 6, 1912, the court made an order confirming the sale, it is also true that, at the time such order was made, the expenses of the receivership, as provided for in the decree, had not been paid; and such order of confirmation was made for the reason that the court was not advised and did not know of Bisher's injuries, and the parties in interest assumed that the claim arising out of Bisher's injuries was not a liability against the receiver, and was not and should not be charged against him as an operating expense. All such questions have been legally settled and deter-

mined by this court when it affirmed the judgment of the lower court in the case of John L. Bisher, guardian ad litem, vs. Robert M. Betts, receiver, in an opinion written by his honor, Judge Gilbert, at the last May term of this court.

The receiver has no funds with which to pay the claim; the Hamilton Trust Company has refused to pay the claim, and appellants now contend that the property should not be charged with an equitable lien for the amount of the claim, and if their position is sustained by the court, not a dollar will ever be collected on the Bisher judgment, and yet, under the law, his injuries are an operating charge of the receiver, and under the facts, the receiver was in possession of and operating the property at the special instance and request of the bondholders, and for and on behalf of the bondholders, and the bondholders, through their trustee, held a certificate of sale of the property and the sale was confirmed after Bisher sustained his injuries.

The case of *Turner vs. Indianapolis, Bloomington & Western Railway Co.*, U. S. Circuit Court, Dist. of Indiana, Drummond, Judge, reported in 8 Bissell's U. S. Court, 7th Circuit, page 527, lays down this rule:

“The receiver of a railroad, appointed in foreclosure proceedings, is the agent of the bondholders and the trustees, and a judgment rendered against him by a court of competent jurisdiction is binding upon the interests of the bondholders.”

In the case at bar, the bondholders became and were the owners of the property, and the court was in pos-

session of the property, through the receiver, at the time Bisher sustained his injuries. The bondholders are estopped, both in law and equity, to deny Bisher's claim to a lien on the property to compensate him for his injuries. The bondholders are not innocent parties or innocent purchasers of the property. They have no legal or moral right to ask a court of equity to appoint a receiver to preserve and operate their property, and save it from loss and destruction, and induce the court, upon their own showing, to appoint a receiver for that purpose, and take a decree of sale and have the property sold to the bondholders, and have it operated by the receiver of the court, by reason of which young Bisher was injured while in the employ of the receiver, and then deny liability or refuse to pay for those injuries. Such policies and methods are a shock to the conscience of the court, and have never been approved, and will never be approved by a court of equity.

It must be conceded that, at the time Bisher sustained his injuries, he was in the employ of, and the property was operated and managed by Betts as receiver. Under Sec. 36, High on Receivers, 4th Ed., page 49, the author says:

“Nevertheless, it may be regarded as a matter resting within the sound discretion of the court whether its receiver shall be permitted to carry on the business which has come under his control. And where it is clear that the conduct of a business by a receiver, under the supervision of the court, will be for the benefit of all parties in interest, and will result in preserving or enhancing the estate in his possession,

courts of equity frequently authorize their receivers, for a limited period, and under the strict supervision of the court, to continue and carry on the business which has thus come into their custody and control. And the power of the court thus to authorize its receiver to continue a business carries with it, as a necessary incident, the authority to authorize him to borrow money for the purchase of all such supplies and materials as may be necessary for the proper maintenance of the business and to secure to the payment of such obligations a preference over the claims of other creditors, making them payable either out of the net income in the hands of the receiver or out of the corpus of the estate if the income proves insufficient, etc."

Under this section, many authorities are cited sustaining the rule.

Again:

"And where a receiver is appointed at the instance and for the benefit of lien holders, who ask that he be authorized to continue a business, all charges and expenses properly incurred by the receiver in so conducting the business, are entitled to priority over the liens of plaintiffs, and are held to be a first charge upon the net earnings or upon the corpus of the estate in the hands of the receiver."

There is a marked distinction between the pending case and the case of *U. S. Inv. Co., a corporation, v. Portland Hospital*, decided by Judge Bean and reported in 40 Oregon, 523. In that case, on page 534 of the opinion, Judge Bean says:

"The receiver was not appointed at their request, nor upon their application, nor was there anything in the receivership proceedings to indicate to them that it was the intention to charge the mortgaged property with a preferred lien for debts contracted by the receiver. Where a mortgagee procures the appointment of a receiver with power and authority to operate and conduct the business of the mortgagor, he cannot object to the payment of the expenses incurred for such purposes in preference to his lien." Citing *Heisen v. Binz*, 147 Indiana, 284 (45 N. E., 104), the syllabus of which lays down this law:

"In a suit to foreclose a mortgage on mining property, B. was appointed receiver on petition of plaintiff. H., a defendant holding a junior mortgage, filed a cross-complaint asking for a receiver until the year for redemption expired. An order appointing B receiver on said cross-complaint provided that he should create no indebtedness except as authorized by the court on notice to the other lien holders, such order being made after a decree ordering a sale to satisfy all liens, subject to expenses and costs. Thereafter the receiver obtained an order to borrow money from H, who was the purchaser at the sale, for the purchase of machinery and the payment of labor and to issue certificates therefor; and during the receivership the receiver incurred liabilities for labor and repairs necessary for the proper operation of the mine, rendering periodical reports to the Court and to H. Held that H could not, after the receiver had resigned and turned over the property in its improved condition, avoid liability for the receiver's expenses on the ground that they were made without order of court."

Quoting from the opinion:

“Under all the circumstances in the case, we do not think appellant is in position to assert the propositions urged by him, even if their correctness were conceded. He should have acted promptly and not waited until the debris was removed from the mine and the machinery put in repair and the property was in good condition to be operated as a mine, and then, after receiving the same, as well as the uncollected accounts due the receiver, and the benefit of all the labor and expense, attempt to avoid the liabilities incurred for such purpose. This, equity and good conscience will not permit.”

Again in *High on Receivers*, 4th Ed., Sec. 394b, page 504, the author says:

“The exercise of this power rests upon the obvious principle that, the court having undertaken the management of the railway at the request and for the benefit of the mortgage creditors, all necessary expenses incurred in such management are a prior charge upon the fund or property, and constitute, in effect, a part of the necessary costs of litigation.”

In *Knickerbocker et al v. McKinley Coal & Mining Co.*, Illinois Supreme Court, reported in 50 N. E., 330, the Court says:

“When it becomes the duty of a court of equity to take property under its own charge through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the re-

ceiver for his services. He is the officer and agent of the court and not of the parties; and it is a right of the court, essential to its own efficiency in the protection of things so situated, to keep them under its control, until such expenses and allowances are paid or secured to be paid. Mr. High on Receivers, section 796, after stating the doctrine that, when a court of equity takes property under its charge by appointing a receiver, the property itself is chargeable with the necessary expenses of the receivership, says, 'And, in such case, the person who, under the final decree of the court, acquires the property or its proceeds, acquires it cum onere, and chargeable with the amounts due to the receiver for services and advances.' Etc."

Again, the court says:

"Under such conditions the court should never surrender its custody of the property, or discharge the receiver, until all obligations incurred by him in the proper discharge of his duties have been adjusted and provided for."

The decree rendered in favor of the Hamilton Trust Company expressly provided that, first, the proceeds of the sale should be applied to the payment of the costs of sale; and, second, to the expenses of the receivership. No fund was ever provided, or any money paid into court, for the expenses of the receivership. Counsel may contend that, at the time of the sale, there were no expenses of the receivership, and for such reason it was not necessary to provide such fund, but at the time of the sale the receiver was in the possession and operation of the property, and *continued in pos-*

session and operation of the property until the 7th day of October, 1912. The purchaser could not and did not acquire title to the property until the sale was confirmed and the deed was executed by the special master, and the property was sold to and bid in by the bondholders through a trustee; and when the bondholders, through their trustee, took title to the property, they took it burdened with any and all of the expenses of the receivership which had accrued between the *date of sale* and the *execution of the deed*, including Bisher's claim.

The legal principles involved in this case are well stated in Thompson on Corporations, 1st edition, section 7151, page 5672, in which the author says:

“In the management of this trust property, negligences are committed by his servants, for which, under the settled principles of law, the receiver is liable—not personally, except where he has been guilty of personal fault, but out of the trust funds in his hands. The liability is then essentially a liability of the fund and not of the custodian. When, therefore, the fund is transferred to a new trustee, whether it be to a new and reorganized corporation created by the purchasers at a mortgage sale for the purpose of receiving and operating the property, or whether it be the original corporations, its former owner, to whom it is redelivered under a new arrangement—it is the case of a trust property to which a liability has attached passing into the hands of a new trustee. The trust property continues liable; but in the very nature of the case, any action brought to charge it must, if

the receiver has been discharged prior to the bringing of the action, be brought against the corporation which is its custodian—that is to say, against the new trustee. If, on the other hand, the action has been commenced prior to the discharge of the receiver, it abates as to him upon his discharge, because the nature of the action is an action to charge the trust property in the hands of a trustee, and it can only be prosecuted against him who is the trustee, and upon the happening of that event, it must be revived against the corporation into whose hands it has passed; that is, against the new trustee. Until the courts plainly see and state, as the reason for their conclusion, that the liability attaches to the thing and that the governing principle is essentially the principle upon which courts of admiralty proceed, then they will flounder about as the judges have done in many cases, and their reasoning ‘will give abundant sport to future days.’ ”

And this is quoted and approved in the case of *Bartlett vs. Cicero Light, Heat & Power Co.* (Illinois), 52 N. E., pages 339-341.

On principle, the case of *Farmer's Loan & Trust Co. and Elijah Smith, Receiver and Trustee, v. Henry L. Newman*, 127 U. S. 649 (Book 32 L. C. P. Co., 303, is square in point as to the power and duty of the court to order another sale of the property. In that case the court set aside:

“The confirmation of the sale by the special master, and the order approving the deed made to the purchaser. The sale was confirmed, the deed to the purchaser approved, and the latter authorized to take

possession, by the order of July 5, 1881. The reservations in that order did not authorize the court to set aside the confirmation of the sale and cancel the deed to the purchaser. The confirmation of the sale and the approval of the deed were, rather, subject to the power reserved, to protect and enforce, by subsequent orders, any claim or lien then pending in either that court or, by its leave, in a state court. So far as Newman is concerned, such protection can be given, and should be given only, by an order directing the entire property covered by the \$1,600,000 mortgage to be sold, in satisfaction of his claim or lien, without nullifying the former sale or the confirmation thereof, and without withdrawing or cancelling the deed made by the special master to the purchaser."

And that case decided that the lower court erred in setting aside the confirmation and sale, but sustained the lien and directed that the property should again be sold to satisfy Newman's lien, and said:

"If they do not discharge, in money, Newman's preferred lien, within a reasonable time fixed for that purpose, the property covered by that mortgage, including the leased premises, should be again sold as an entirety, or so much thereof sold as may be necessary, to raise the amount, principal and interest, due him, together with his costs in the court below from the time he filed the petition of intervention."

On principle, this sustains the position of the lower court in the pending case, and is authority for the order of sale of the property which was made by decree of his honor, Judge Wolverton.

PROPERTY ACQUIRED BY THE RECEIVER.

It appears from the record that the receiver acquired the lands from McDonald and constructed a power plant on such lands, and acquired a water right from the State of Oregon, and that neither the lands nor the water right so acquired are mentioned or described in the trust deed or mortgage executed to the Hamilton Trust Company. Also, that during his receivership, he constructed a cyanide plant at a cost of about \$70,000 on the property mentioned and described in the trust deed or mortgage.

The decree from which this appeal is taken, among other things, provides; paragraph IV, page 167 of the Transcript of Record:

"First.

That any and all of said property which was conveyed to or acquired by the said The Cornucopia Mines Company of Oregon, or the receiver thereof, on and after the said Robert M. Betts was appointed and qualified as such receiver, as mentioned and described in Findings No. II, IV, V and VI of this decree, or such portion thereof as might be necessary, shall be sold as hereinafter provided.

"Second.

Should the proceeds of such sale be not sufficient to satisfy this decree, that any and all of the property mentioned and described in such trust deed or mortgage, and as specifically described in paragraph I of this decree, shall be sold."

During the receivership, Alexander McDonald executed to The Cornucopia Mines Company of Oregon three different deeds to property, each of which contained different descriptions, but each of which contained portions of the same description of the other deeds, and each of which was intended to describe and convey about five acres of ground.

Page 183, Transcript of the Record:

“Q. When did you come to an agreement with him for this purchase?

A. The latter part of February, 1912. Now, I would like to say this in regard to this: There seem to be three deeds. The way that occurred, there was some placer mining going on, and for fear that these men who wanted placer ground might tie McDonald up, I got him to deed me five acres of ground; but it was later determined, when the pipe line was surveyed, that the ground covered by the original deed did not quite cover the ground on which we wished to place the power house. Then another deed was made to cover this.”

The deed which was executed on July 16, 1912, conveys:

“Also a right of way for the pipe line of The Cornucopia Mines Company of Oregon, over and through that certain portion of the lands described as follows: The $SE\frac{1}{4}$ of the $NW\frac{1}{4}$, the $NE\frac{1}{4}$ of the $SW\frac{1}{4}$, the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of Section 3, for said distance of 3,500 feet, more

or less. The above described premises and right of way are in Tp. 7 S., R. 45 E. W. M. Said pipe line to be used for electric and power purposes."

The deed executed on August 1, 1912, in addition to the land, conveys:

"Also a right of way 25 feet in width for pipe line and transmission line from the south line of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ through the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$, the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$, the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 3, Tp. 7 S., R. 45 E. W. M., and to be located according to surveys, agreed upon by said Alexander McDonald and Robert M. Betts, receiver for The Cornucopia Mines Company of Oregon. The length of this line is not to exceed 3,700 feet."

It also appears that, upon the application of Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, a permit, No. 1060, was granted to him as such receiver by John H. Lewis, State Engineer, and approved on February 28, 1912, for a certain water right of 9 $\frac{1}{3}$ cubic feet per second, and that it was to be applied to power for mining purposes to the extent of 500 horsepower; that such power would be developed by an electric plant with Pelton wheels, and the works are to be located in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 3, T. 7 S., R. 45 E. W. M., and the power is to be applied in "running quartz mill and compressors;" and the nature of the mines to be served is Cornucopia Mines Company. And it appears from such application that "Construction work will begin on or before June 1, 1912, and will be completed on or before October

15, 1912, and the water will be completely applied to the proposed use on or before November 1, 1912."

It also appears from the record that the receiver, without any order, and without even any knowledge of the court on the 20th day of November, 1912, executed his deed for such water right application and permit, as receiver, to The Cornucopia Mines Company of New York. It also appears from the testimony of the receiver that the power plant was constructed on the land specifically described in the third, or last, deed from Alexander McDonald to The Cornucopia Mines Company of Oregon, at a cost of about \$20,000.

Page 206, Transcript of Record:

"Q. Now, Mr. Betts, after you made these water filings and purchased this property from Mr. McDonald, what, if anything, was done with the filings? What did you do with them?

Q. Well, did you make any improvements on them?

A. On the ground that I bought from McDonald?

Q. Yes.

A. Yes sir.

Q. What did you do?

A. Built a power house.

Q. When did you do that?

A. About September, 1912.

Q. And what is the value of those improvements? What did they cost?

A. About \$20,000.

Q. Power house, you say?

A. Yes sir.

Q. For the purpose of generating power?

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A. Yes sir.

Q. Is power generated there now?

A. Yes sir.

Q. And when did you commence the construction of that power house on that ground that you bought of McDonald?

A. In August or September, 1912.

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“Q. Now, Mr. Betts, on what particular piece of land is this power house situated? Just point out in the deed there.

A. It is constructed on the ground bought from McDonald.

Q. I know, but ground described in which deed?

COURT: The first, second or third deed?

A. The third deed, the deed of August 1st. That was determined by the final survey.

Q. Upon what lands is the cyanide plant constructed?

A. On the old ground, the ground covered by the mortgage.

Q. And that cyanide plant you say cost about \$70,000?

A. Yes sir.

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Q. Now, this power plant that was constructed on this land. Where did you get the machinery for that?

A. In San Francisco—in San Francisco and New York.

Q. Now, when this water filing, or permit rather, was obtained from the office of the State Engineer, was there a ditch or flume-line then extended?

A. Yes, it was all built. The flume had been there for years.

Q. And you rebuilt it?

A. No. You see, Mr. Johns, the flume came about a mile down the creek, which gave about 300 feet fall. But that was not sufficient, so at the end of the pipe line, where the old power house was situated, we put in a "Y," and carried this water under pressure farther down the creek, until we got about a 500 foot fall, which increased the pressure, thereby increasing the horse power.

Q. You took it down by pipe instead of flume?

A. Took it down by pipe, yes sir.

Q. And how much pipe was put in there?

A. In the neighborhood of 3,500 feet.

Q. And what did that cost?

A. About \$10,000 delivered.

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Q. Now, tell the court where you got the money to make those expenditures, and to pay for the improvements, and the machinery specifically?

A. It was sent me from Mr. Lawrence's office, and aggregated up till about the 1st of September some \$83,000.

COURT: Up to what year?

A. 1912.

COURT: That was sent to you prior to the receivership and during the receivership?

A. Yes sir, prior to the receivership and during the receivership.

It thus appears that the present power house is constructed upon land which was purchased by the receiver from McDonald, and that the water right application was made by and the permit granted to the receiver, and that the power house was constructed during the receivership at a cost of about \$20,000; and

that the pipe line was extended and constructed at an estimated cost of \$10,000; and that a cyanide plant was constructed at a cost of about \$70,000 or \$80,000, and that none of said property is embraced or specifically described in the mortgage, and that the power house and pipe line are on real property which was acquired by the receiver, and not in any manner mentioned or described in the mortgage, and the same thing is true of the water application and permit. None of said property is mentioned or described in the deed which was executed by the special master to C. E. S. Wood as trustee for the bondholders, and the decree expressly provides that all property which was conveyed to or acquired by the said The Cornucopia Mines Company of Oregon, or the receiver, on or after the date he was appointed and qualified as such, should be sold first, and that if the proceeds of such sale should not be sufficient to satisfy such decree, the property which is specifically described in the trust deed or mortgage could then be sold. And in any event, and under any theory of this case, Bisher is entitled to collect his judgment from any and all property which was not sold under the original decree and conveyed by the special master to C. E. S. Wood, trustee for the bondholders.

Under the facts as disclosed by the record, the effort to defeat Bisher's lien will never appeal to a court of equity and will shock the conscience of the court.

In the answer to the Bill of Intervention, among other things it is alleged (bottom of page 122 Transcript of Record) that on the 7th day of October, 1912, C. E. S. Wood, as trustee for the bondholders, did make, ex-

ecute, acknowledge and deliver to The Cornucopia Mines Company of New York a deed, in and by which he conveyed any and all of the property sold and conveyed to him by the special master in chancery, and "said Cornucopia Mines Company of New York is in no wise connected with The Cornucopia Mines Company of Oregon, respondent in this action, but is composed in large part of the general purchasers and owners of the mortgage bonds of The Cornucopia Mines Company of Oregon, which were foreclosed in this action in this court."

Prior to the rendition of the decree from which this appeal is taken, the receiver was called as a witness and testified:

Page 210, Transcript of Record:

"Court: What explanation do you want to make?

A. I was going to say that the lease was given me primarily so that I could go ahead and carry on this work with greater expedition, and so that my hands would not be tied. All the men connected with the concern lived in New York, and they had no head office, and the lease was given to me more with that in view, so that I could go ahead with a free hand.

Court: Then, you were operating in effect for the lessor?

A. For the company, yes.

Court: Well, was it the New York company or the Oregon company?

A. No, the New York company. It wasn't a company at that time at all. It was a group.

Court: And in this case, although you were lessee of these mines by written contract, you were virtually the manager for the New York company.

A. Well, there was no——

Court: I am asking you if that was the effect?

A. Yes sir. There wasn't any company.

Court: But you were the manager?

A. For men in the east.

Court: I mean for a company that was to be organized?

A. Yes sir.

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Court: That is, for the promoters of the company?

A. Yes sir.

Court: That was your real position?

A. Yes sir.

Q. And that company was afterwards re-organized as The Cornucopia Mines Company of New York?

A. Yes sir.

Q. Now Mr. Betts, have you any funds in your possession as receiver?

A. No sir.

Court: You haven't made any report, have you, as to the funds paid into court to comply with the sale?

Mr. Callahan: No, we are expecting Mr. Betts to make that report now. He hasn't any money. I supposed that was understood.

Court: Well, there were certain funds to be paid into court to pay the costs until the costs were satisfied, and until the claim against the estate which was prior to the mortgage was satisfied under the terms of the sale, and I think a report ought to be made of that, to inform the Court what has been done.

Mr. Callahan: Oh, yes, I will make that report; but Col. Wood paid the costs and took care of that.

Court: It ought to have gone through court proceedings, so the Court would know.

Page 212:

Court: Is the master's report filed, and does that contain that information?

Mr. Johns: No sir, there is no such information in the master's report.

Mr. Callahan: I don't know that it does in detail, but some way it indicates that it is paid, or Col. Wood has made the statement that he paid it in greenbacks. I know the clerk's costs were paid, because he returned me some funds—\$10 or \$12 or such a matter—of a surplus by his check. He did that very recently, within the last few months.

Mr. Johns: I don't want to testify, your Honor, but if it is necessary I will go into that. The master's report shows there was not a single dollar of money paid over to the master from this sale; that the property was bid in for the bonds, and the bonds only; and the confirmation shows it, too.

Court: That is the very reason why this Court is inclined to allow this procedure by which an execution may go against this property for a resale. The order of the Court provided, when the sale was made, that the purchaser might pay in bonds, but the expenses and costs of the sale, and by my rendition of the order of sale, the expenses and costs of the receivership should first be paid. The purchaser has not complied with that order. The purchaser has not paid the costs of the receivership, which I think to be legitimate costs, including this demand. And I think there ought to be a report made as to what was done in that respect, and what money was paid into court, and why this other money was not paid.

Page 213:

Court: I think the report ought to go to the full extent, so as to inform this Court just what was done; and if there has not been money paid into the court for the purpose of taking care of the receivership, it ought to be paid in now.

Mr. Callahan: That is true, but if the Court will remember this: The property was sold on the 29th day of June under the master's sale, and Mr. Betts, of course, received no compensation as receiver, because he received his compensation out of his lease, and not made out of the lease, he received \$350 as his commission in this report here.

Court: It appears now that he was acting for the promoters of this second company, the New York company.

Mr. Callahan: That is true. He had a written lease of that character.

Court: I suppose if this judgment had been against him as lessee, that fact would not have come to light at all.

Page 214:

Court: There has been no report made to this Court. The Court has not been informed at all.

Page 216:

Q. What consideration did you receive for making that deed to The Cornucopia Mines Company of New York?

A. The consideration, I think, in the deed was \$1 and other valuable consideration.

Q. Well, what consideration did you receive for making it?

Court: What was the actual consideration?

A. That is all. There was no money—no other money paid; no money paid.

Q. Is there anything in that decree directing you to execute a deed to any property to The Cornucopia Mines Company of New York?

A. No sir. But as I understood the matter, it was transferred by the mortgage—the mortgage covered that; but that it was necessary in order to perfect the title to have the deed.

Q. Where did you get that information?

A. I got it from talking with the lawyers, and from the mortgage itself.

Page 222:

Q. You have been paying yourself as lessee a salary of \$350 a month during the time you were receiver?

A. Yes, sir. That was understood, I think, because I was to receive no compensation as receiver.

Q. Did you ever apply to the Court for an order for that?

A. It was in the original order that I was to receive no compensation as receiver.

Q. Well, did you ever apply to the Court for an order fixing your compensation that you were to have from anyone?

A. Why, no. I didn't think it was in the Court's jurisdiction—that was all. I had been receiving it right along.

Page 223:

Q. You thought the Court had nothing to do with that?

A. Why, no. I had been receiving that before the receiver was ever thought of.

Q. With whom did you have this understanding that you were to receive \$350 a month?

A. Benjamin B. Lawrence, of New York.

Q. Who is he?

A. He is a mining engineer.

Q. What relation does he sustain to The Cornucopia Mines Company of New York?

A. He is consulting engineer of the company today.

Q. One of the stockholders?

A. Yes, sir.

Q. An officer in the company?

A. I think he is vice-president.

Court: Who is the manager of this company:

A. I am.

Court: You are the manager?

A. Yes.

Court: With authority to do all things necessary to the operation of the mine?

A. Yes, sir. That is except where it requires a resolution of the board; that is, in making deeds and things like that.

Court: Yes, I understand.

Q. When did you first enter into the employ of these people under the arrangement that you have been testifying about?

A. In November, 1910.

Page 224:

Q. You have been working for the same people all the time ever since?

A. Yes, sir. Would you like to have this cleared up a little more.

Q. I will clear it up. When did you cease your employment for The Cornucopia Mines Company of Oregon?

A. When the receivership started.

Q. And when did you enter on your employment for the Cornucopia Mines Company of New York?

A. When it was formed.

Q. When was that?

A. November, 1912. Well, that is at the termination of the lease. The lease was not renewed after that. All this construction work had been completed, and things were settled down in a quiet state.

Q. Who completed this construction?

A. I completed it.

Q. I know, but for whom were you acting during that period?

A. For these men in New York.

Q. Well, what men?

A. Well, I don't know the names of but two of the men connected with it. It was a syndicate of men that the new company was formed of.

Page 225:

Q. Well, who was it?

A. Yes and no. There are a lot of new men in it now. That is one thing I thought I would clear up if possible.

A. The Searles estate owned or controlled the stock, I think, of the old company and some of the bonds; and the Court ordered this estate to be closed up.

Court: Back there?

A. Back there. And the administrator came to Mr. Lawrence and said 'This has to be sold at a certain date,' and asked him if he would buy it in, and Mr. Lawrence said he would. Now, after they bought in this stock which was held by the Searles estate, they were unable to get some of the rest of the stock, and this Laubheimer judgment came up, and they bought the bonds. It was easier to buy the bonds than the stock. And Mr. Laubheimer had a judgment against the company for some \$12,000.

Q. The Cornucopia Mines Company of Oregon?

A. Of Oregon. So they decided to foreclose these bonds, and clear up all the litigation and these other claims, and have the property in good shape.

Court: It was your intention, then, to clear up all the matters against this estate?

Page 226:

A. Yes. Try to make it at least mineable. It had always been in litigation before.

Court: It was also your intention to take care of the receivership charges in closing out this business.

A. Now, of that I had no knowledge, you see. That is, how do you mean?

Court: It was also the intention of the promoters, when the receiver was appointed, to take

care of the costs and charges and expenses of closing out the receivership?

A. Yes, sir.

Q. So as to get a clear mine?

A. Yes. And so they advanced money. Now, who these friends of Mr. Lawrence's were, I do not know. I had known Mr. Lawrence for years, and he had confidence enough in me to say 'Here, you can handle this better to have a lease on it, because we have no organization back here and on account of the short summer seasons this work might have to be rushed, and we would prefer to give you a lease on it, so that you will not be bothered with'—

Q. Getting orders from headquarters?

A. Getting orders from headquarters.

Page 230:

Q. Now, tell the Court where you got the money to make these expenditures, and to pay for these improvements and the machinery, specifically?

A. It was sent me from Mr. Lawrence's office, and aggregated up till the first of September some \$83,000.

Q. What year?

A. 1912.

Court: That was sent to you prior to the receivership and during the receivership?

A. Yes, sir. Prior to the receivership and during the receivership.

Page 231:

A. I thought the matter had been merely cleared up, and that my receivership was awaiting its course on the docket to be discharged.

Court: Well, it would have been discharged had it not been for this judgment against you as receiver."

There is another angle to this case which should give Bisher an equitable lien. It appears from the report of the receiver (Transcript of Record, pages 77, et seq.), that his gross receipts from the operation of the property from January 1, 1912 to August 1, 1912, were \$70,899.46, and that during such period his expenditures were \$71,681.27. The receipts were from bullion and concentrates derived from the operation of the mine.

The nature and purpose of the expenditures are all evidenced by numbered vouchers which are now on file in the clerk's office in the lower court, and from which it appears that the last item of the report for each month is for and on account of labor. The report also gives an itemized statement of the amount of bullion and concentrates for each month.

In our brief on the former appeal in this case, on pages 29, 30 and 31, is a statement of the items, evidenced from the vouchers by number, from which it appears that the receiver, between January 1 and August 1, 1912, expended the sum of \$12,714.26 for sup-

plies for the necessary operation of, and betterments and improvements on, the property.

Such facts all appear from the receiver's report and his vouchers on file with the clerk of the lower court. That is to say, that exclusive of the money expended in the construction of the power plant and the pipe line and the cyanide plant, the receiver, between those dates, made other betterments and improvements on the property to the value of \$12,714.26, which does not include his salary as receiver between those dates, amounting to \$2,620.75, and which was paid out of the proceeds of such bullion and concentrates without any order or authority of court.

It thus appears that, during his receivership and prior to the 1st day of August, 1912, the receiver placed betterments and improvements on the property of the value of \$12,714.26, which the bondholders now claim to have acquired under the foreclosure sale, in addition to the land which was purchased by the receiver for the power house, and the power plant which was constructed upon the land at a cost of \$20,000, and the pipeline which was constructed at a cost of \$10,000, and the cyanide plant which was constructed at a cost of about \$70,000 or \$80,000.

How and in what manner did the trustee for the bondholders acquire title to all of such betterments and improvements which were acquired and constructed by the receiver, and what right have they to deny an equitable lien upon the property in favor of Bisher? The bondholders, through their trustee, purchased the property on the 29th day of June, 1912, and yet they deny

Bisher an equitable lien on, and claim title to, all the property mentioned and described in the trust deed or mortgage, together with any and all other property, and betterments and improvements placed thereon by the receiver after the date of sale.

From the records it conclusively appears that, at the time of the sale, Mr. Wood purchased the property as trustee for the bondholders under the original trust deed or mortgage, and that Robert M. Betts was appointed as receiver on the showing and petition of Hamilton Trust Company, to operate and preserve the property pending the foreclosure suit, for the use and benefit of the bondholders, and that the property was sold to a trustee for the bondholders, and that in legal effect, The Cornucopia Mines Company of New York is nothing more than a reorganization of The Cornucopia Mines Company of Oregon by the bondholders of The Cornucopia Mines Company of Oregon, and for their use and benefit, and that The Cornucopia Mines Company of New York is 'composed in large part of the general purchasers and owners of the mortgage bonds of The Cornucopia Mines Company of Oregon.'

It appears from the record that the purpose of the suit was to get rid of the Laubenheimer judgment, and sell the property and reorganize the company with substantially the same bondholders, and that pending the suit, and to protect the property, it was necessary to have it operated by a receiver, and at the instance and request of the parties in interest, and based upon a petition therefor, Robert M. Betts was appointed as such receiver. Prior to his appointment he was manager of

the property of The Cornucopia Mines Company of Oregon, and after his appointment as receiver, he was really acting for and in the interest of the bondholders' committee, which afterwards organized—The Cornucopia Mines Company of New York, to which Mr. Wood, as trustee for the bondholders, conveyed the property on the 7th day of October, 1912.

John L. Bisher, Jr., a boy of about 18 years of age, was in the employ of the receiver, and on the 29th day of July, 1912, sustained serious personal injuries from which he will never recover, including the loss of an arm and severe injury to the other, and for which a jury in the Federal Court gave his guardian ad litem a verdict for \$12,500, nearly two years ago; and all of the parties in interest disclaim liability, and apparently are combined in their efforts to defeat the payment of his claim, and for that purpose joined in an appeal to a court of equity. Under the facts in this record, they are all estopped, as against Bisher's claim, to claim or assert that they are purchasers in good faith of this property.

The fact remains that Bisher sustained serious personal injuries, and nearly lost his life, while in the employ of the receiver, and that the receiver was appointed to operate, protect and preserve the property for the use and benefit of the bondholders, and that the property was sold to a trustee for the bondholders, and was by that trustee conveyed to The Cornucopia Mines Company of New York which "is composed in large part of the general purchasers and owners of the mortgage bonds of The Cornucopia Mines Company of Oregon."

We will concede that "The rights and liabilities of a purchaser at a judicial sale are measured by the terms and conditions of the decree," as counsel in bold type assert, but we also claim that such a decree should be construed by all the facts as disclosed by the record, and in accord with equity and good conscience, and when so construed, Bisher is entitled to an equitable lien.

It is a matter within the knowledge of this Court that judgment was rendered in the case of John L. Bisher, guardian ad litem, vs. Robert M. Betts, receiver, after a trial of that case by His Honor, Judge Charles E. Wolverton; that an appeal was taken from that judgment which was afterwards affirmed by this Court; and that the decree from which this appeal was taken was rendered by the same judge, who had access to and personal knowledge of all of the records and proceedings in both cases, and that after a full investigation thereof that same Judge rendered the decree from which this appeal is taken, and from an examination of such records, it conclusively appears that the appellants have no standing in a court of equity, and that as a matter of both legal and equitable right, Bisher should have and does have a lien on the property to the amount of his judgment.

If the contention of appellants' counsel is true, and the title to the property passed on the 29th of June, 1912, the date of the sale, and the receiver surrendered the possession and operation of the property and had no funds or property in his hands as such receiver, why did he contest, and employ able counsel to defend, that action against him, and why did he prosecute an appeal

to this Court from the judgment rendered in that action? Why is this appeal now taken and prosecuted by The Hamilton Trust Company, which has no interest in the result of this case? There is no equity in appellants' case, and from a study of the records it becomes more and more apparent that the bondholders under the trust deed or mortgage are the real parties in interest, and through able counsel are seeking to defeat the just claim of a minor boy who was made a cripple for life while in the employ of the receiver, who was appointed by the Court at their request to protect and operate and preserve their property.

The appeal should either be dismissed, or the judgment affirmed on its merits.

Respectfully submitted,
BOOTHE & RICHARDSON,
CHARLES A. JOHNS,
Solicitors and Attorneys for Appellee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and

CORNUCOPIA MINES COMPANY OF OREGON, et al.,
Respondents and Appellants,

vs.

JOHN L. BISHER, JR., by John L. Bisher, his guardian
ad litem,
Intervener and Appellee.

Reply Brief of Appellants

WALLACE McCAMANT,
EMMETT CALLAHAN,
WOOD, MONTAGUE & HUNT,
Solicitors for Appellants.

Upon Appeal from the District Court of the United
States for the District of Oregon.

Filed

FEB 8 - 1915

F. D. Monckton,
Clerk.

APPELLANTS' REPLY BRIEF.

Appellants regard the concluding portion of Appellee's Brief, found on pages 57 to 78, so misleading that we think it necessary to make some reply thereto in order to put the Court right as to the condition of the record.

We find on page 57 of Appellee's Brief the following language:

"It appears from the record that the Receiver acquired the lands from McDonald and constructed a power plant on such lands, and acquired a water right from the State of Oregon, and that neither the lands nor the water right so acquired are mentioned or described in the trust deed or mortgage executed to the Hamilton Trust Company."

From page 57 to page 64 solicitors for Appellee advance their contentions that the Receiver made betterments on the property amounting in the aggregate to a large sum of money, and then follows this sentence on page 64:

"None of said property is mentioned or described in the deed which was executed by the Special Master to C. E. S. Wood as Trustee for the bondholders."

The fact is that the report of the Special Master Commissioner who sold the property to C. E. S. Wood on the 29th of July, 1912, reported a sale not

only of the property specifically described in the bill of complaint on pages 11 to 20 of the record, inclusive, but this report also contained the language with reference to appurtenant and after acquired property found on pages 20 and 21 of the record, as follows:

“**TOGETHER** with all the machinery for the reduction of ore, mining machinery, mining tools and equipment, ore of all kinds and personal property located at Cornucopia or Baker City, Oregon, or on the property known as the Cornucopia Mines of Oregon, or elsewhere now held or acquired or hereafter held or acquired for use in connection with the said Cornucopia mines, or the business thereof; **and also all the easements, property, leasehold rights and things of whatsoever name or nature now or hereafter connected with or relating to the said Cornucopia Mines, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining** and the reversion and reversions, remainder and remainders, and also all the estate, right, title and interest, property, possession, claims and demand whatsoever as well at law as in equity of the Cornucopia Mines of, in and to the same and any and every part thereof, with the appurtenances. The personal property and chattels above conveyed and transferred or intended so to be, now held or hereafter acquired, shall be deemed real estate for all the purposes of this indenture and shall be held and taken to be fixtures and appurtenances of the said Cornucopia Mines and part thereof and are to be

used, and in case of a sale hereunder, are to be sold therewith."

The foregoing description was followed in the deed executed by the Special Master Commissioner to C. E. S. Wood, the purchaser, and in the deed from C. E. S. Wood to Cornucopia Mines Company of New York, the present owner of the property.

The properties referred to in the portions of Appellee's Brief to which we are replying, are a power site purchased during the receivership for the sum of \$250.00, on which after the property had been sold at foreclosure sale a power plant was erected, and a cyanide plant erected on property specifically covered by the mortgage and specifically described in the advertisement and report of sale and the deed executed by the Master Commissioner (Bisher 227). With the exception of the \$250.00 paid Alexander McDonald for the purchase of the site and power plant no receivership money went into these improvements. The cyanide plant was used in connection with the operation of the mine, as was the power plant. They were plainly appurtenant to the mineral property and they plainly fall within the description of appurtenant and after acquired property above quoted, which description we repeat was included, and properly included, in the deed from the Master Commissioner to Wood and from Wood to Cornucopia Mines Company of New York. That equity will recognize and enforce a mortgage of after acquired property, especially where it is appurte-

nant to property specifically described in the mortgage is well settled.

Bear Lake Company v. Garland,
164 U. S. 1, 15.

The books are full of cases where valuable assets have passed by foreclosure under language akin to that quoted above and found in the mortgage and deeds making up the chain of title of the present owner of the property. See for example,

Parker v. New Orleans Company,
33 Fed. 693.

In Re Medina Quarry Company,
179 Fed. 929, 935-936.

Hickson Company v. Gay Company,
150 N. C. 316;
63 S. E. 1045.

Brady v. Johnson,
75 Md. 445;
26 Atl. 49, 52.

The deeds executed by McDonald ran to Cornucopia Mines Company of Oregon and not to the Receiver.

There is also referred to in the portion of Appellee's Brief to which we are replying a so-called water right. The fact is that the water right referred to by solicitors for Appellee had been appurtenant to this mineral property for a long period of years and had been owned by the respective owners of the property. The supply of water was adequate

and no additional water was applied for or desired by the Receiver. The Receiver did desire to carry the water a mile further down the hill in order to secure a greater head and command more power (Bisher 204). For this purpose and with a view to complying with the new water code of the State of Oregon, an application was made by the Receiver for permission to divert the water at this lower point. This permission was granted by the State Engineer and pursuant to authority contained in the foreclosure decree the Receiver transferred this permit to Cornucopia Mines Company of New York. Except the properties above referred to the Receiver has not had at any time, nor has he now, in his possession, or under his control, any property whatever (Betts 232):

A. No, sir.

Q. Mr. Betts, I want to ask you another question. Have you any other property in your possession, or has any other property come into your possession, aside from what has been transferred by these deeds in question, first, by the deed under the foreclosure sale, and the deed you have given as Receiver to the New York Company?

A. No, sir. No, nothing. You mean real estate? Have I bought any property?

Q. Well, has any property come into your hands as Receiver?

A. No.

Q. That has not been disposed of?

It clearly appears that the improvements which the Receiver placed upon the property were paid for by moneys secured by him without encroaching on the receivership funds (Betts 230-231):

Questions by Mr. Callahan.

Q. Now, just one more question, Mr. Betts, to make it clear to the Court. You have testified here in relation to certain permanent improvements that were made at various times, which were contemplated before the receivership, some carried on during the receivership and some portions carried on after the receivership?

A. Yes.

Q. Now, tell the Court where you got the money to make those expenditures, and to pay for those improvements, and the machinery specifically.

A. It was sent me from Mr. Lawrence's office, and aggregated up till about the first of September some \$83,000.

COURT: What year?

A. 1912.

COURT: That was sent to you prior to the receivership and during the receivership?

A. Yes, sir; prior to the receivership and during the receivership, and was deposited in my name as leesee, in Spokane, Washington, in the Spokane Bank.

Q. Where were you in the habit of carrying your account under the receivership and as leesee of the mine?

A. In the Citizens Bank of Baker, Oregon. I did my best, your Honor, to keep things separate and straight.

Betts 214-215.

Q. Mr. Betts, while you were in charge of this property as Receiver, what improvements, if any, did you make on that property?

A. Very few as Receiver.

Q. Well, did you make any at all?

A. Not that I remember of now, no sir.

Q. Didn't you construct a cyanide plant on it?

A. Not as Receiver, no sir.

Q. Didn't you do it otherwise?

A. I put in other money, yes sir.

Q. How much did that cyanide plant cost?

A. About \$70,000 or \$80,000.

Q. And what other betterments and improvements did you put on this property during the time that you were Receiver?

A. Merely the power-house.

Q. And what other improvements?

A. None that I remember now as being of any magnitude.

The fact is that the funds provided by Benjamin B. Lawrence and his associates paid the Receiver's salary of \$350.00 a month (Bisher 223), paid \$600.00 advanced by the Receiver to take care of the hospital expense of John L. Bisher, Jr. (Betts 220), and probably paid other expenses as well.

The testimony from which we have quoted above is wholly uncontradicted. The statement found on page 77 of Appellee's Brief to the effect that \$12,-714.26 from the receivership funds went into the improvements and betterments above referred to is wholly without support in the record and is contradicted by the only testimony which bears upon the subject. If the argument of solicitors for Appellee be correct in contending that they are entitled to levy on the properties acquired by the Receiver and paid for with receivership funds, the application of the argument is limited to the amount of \$250.00 paid Alexander McDonald for the five-acre strip of land. We do not overlook the fact that \$300.00 of additional receivership money was paid to McDonald by way of damages done to his property. This was an operation expense and not a betterment.

Respectfully submitted,

EMMETT CALLAHAN,
WOOD, MONTAGUE & HUNT,
WALLACE McCAMANT,

Solicitors for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

**JUNG QUEY alias SAM KEE, LI CHEUNG, MON
HING and JT YEE,**

Plaintiffs in Error,
VS.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court of the
Northern District of California, First Division.**

Filed

JAN 28 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JUNG QUEY alias SAM KEE, LI CHEUNG, MON
HING and JT YEE,

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vs.

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Upon Writ of Error to the United States District Court of the
Northern District of California, First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*United States of America, District Court of the
United States, Northern District of California.*

CLERK'S OFFICE—No. 5541.

UNITED STATES OF AMERICA,

vs.

JUNG QUEY et al.

Praecipe [for Transcript of Record].

TO THE CLERK OF SAID COURT:

Sir: Please issue Indictment.

Demurrer of Jung Quey.

Demurrer of Li Chung and Yik Fat.

Demurrer of Mon Hing.

Mar. 9. Order overruling demurrers.

March 13. Plea of defendants.

April 13. Verdict, not guilty as to first count.

June 10. Impanelment of jury.

June 11. Minutes of trial.

June 12. Minutes of trial.

June 12. Verdicts.

June. 25. Motions in arrest of judgment, motion for
new trial, Order denying motions and sentence,
Judgment.

July 7. Petition for writ of error, Order writ of
error allowed, bail Jung Quey, fixed, assignment
of errors.

Bill of exceptions.

Cost bond on writ of error.

Citation on writ of error.

Writ of error.

J. C. CAMPBELL and
WM. HOFF COOK,
Attorney for Appellants.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

Indictment.

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

At a Stated Term of Said Court Begun and Holden
at the City and County of San Francisco, in the
State and Northern District of California, on
the First Monday of November, in the Year of
Our Lord One Thousand Nine Hundred and
Thirteen. The Grand Jurors of the United
States of America, Within and for the State and
District Aforesaid on Their Oaths Present:

THAT JUNG QUEY, alias SAM KEE, LI
CHEUNG, YIK FAT, MON HING, and JT YEE,
heretofore, to wit, on the twenty-ninth day of Janu-
ary in the year of our Lord, One Thousand Nine
Hundred and Fourteen, in the Northern District of
California, and within the jurisdiction of this honor-
able Court, did wilfully, knowingly, unlawfully,
wickedly, corruptly and feloniously conspire, com-
bine, confederate and agree together and with divers
other persons whose names are to the Grand Jurors
aforesaid, unknown, to commit certain offenses
against the United States, that is to say:

Violation
Sec. 37 C. C.
U. S. and Act
Feb. 9, 1909
as amended,
etc.

They, the said JUNG QUEY, alias SAM
KEE, LI CHEUNG, YIK FAT, MON
HING, and JT YEE did, at the time and
place aforesaid, knowingly, willfully, unlawfully,
wickedly, corruptly and feloniously conspire, com-

*Page-number appearing at foot of page of original certified Record.

bine, confederate and agree together and with said divers other persons whose names are, as aforesaid, to the Grand Jurors aforesaid unknown, to wilfully, unlawfully and knowingly import and bring into the United States, and assist in so doing, from some foreign port or place to the Grand Jurors aforesaid, unknown, seven skins or bladders containing fourteen pounds of opium [2] prepared for smoking purposes, contrary to law.

That said conspiracy, combination, confederation and agreement between the said JUNG QUEY, alias SAM KEE, LI CHEUNG, YIK FAT, MON HING, and JT YEE, and the said divers other persons whose names are, as aforesaid, to the Grand Jurors aforesaid, unknown, was continuously throughout all the time from and after the said twenty-ninth day of January in the year of our Lord One Thousand Nine Hundred and Fourteen, and at all of the times in this indictment mentioned, and referred to, and particularly at the time of the commission of each and all of the overt acts in this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said LI CHEUNG and YIK FAT, on or about the thirtieth day of January in the year of our Lord one thousand nine hundred and fourteen, brought into the port of San Francisco in the State and Northern District of California, from some foreign port or place to the Grand Jurors aforesaid, un-

known, seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes, contrary to law.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said LI CHEUNG and YIK FAT, on the thirtieth day of January in the year of our Lord one thousand nine hundred and fourteen, on the Steamship "China," then and there lying and being in the port of San Francisco in the State and Northern District of California, prepared seven skins or bladders containing [3] fourteen pounds of opium prepared for smoking purposes which said opium had theretofore been brought into the United States from some foreign port or place to the Grand Jurors aforesaid, unknown, contrary to law, for the purpose of causing the same to be delivered to the said JUNG QUEY, alias Sam Kee.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said LI CHEUNG and YIK FAT, on the thirtieth day of January in the year of our Lord one thousand nine hundred and fourteen, on the steamship "China," then and there lying and being in the port of San Francisco in the State and Northern District of California, then and there delivered seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes, to one H. Matthaei, a quartermaster on said steamship

“China,” for the purpose of having the said opium delivered to the said JUNG QUEY, alias Sam Kee.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said MON HING and JT YEE, on the thirty-first day of January in the year of our Lord one thousand nine hundred and fourteen, at the City and County of San Francisco in the State and Northern District of California, received seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes, which said opium had theretofore been brought into the United States from some foreign port or place to the Grand Jurors aforesaid, unknown, contrary to law, by the said LI CHEUNG and YIK FAT. [4]

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present:

THAT, JUNG QUEY, alias Sam Kee, LI CHEUNG, YIK FAT, MON HING, and JT YEE, heretofore, to wit, on the twenty-ninth day of January, in the year of our Lord one thousand nine hundred and fourteen in the Northern District of California, and within the jurisdiction of this honorable Court, did wilfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together and with divers other per-

sons whose names are to the Grand Jurors aforesaid, unknown, to commit certain offenses against the United States, that is to say:

They, the said JUNG QUEY, alias Sam Kee, LI CHEUNG, YIK FAT, MON HING, and JT YEE did at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together and with said divers other persons whose names are, as aforesaid, to the Grand Jurors aforesaid, unknown, to wilfully, fraudulently and knowingly receive and conceal seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes, which as they, the said JUNG QUEY alias Sam Kee, LI CHEUNG, YIK FAT, MON HING, and JT YEE then and there knew, had been imported into the United States contrary to law.

That said conspiracy, combination, confederation and [5] agreement between the said JUNG QUEY, alias Sam Kee, LI CHEUNG, YIK FAT, MON HING and JT YEE, and the said divers other persons whose names are, as aforesaid, to the Grand Jurors aforesaid, unknown, was continuously throughout all the time from and after the said twenty-ninth day of January in the year of our Lord one thousand nine hundred and fourteen, and at all of the times in this indictment mentioned, and referred to, and particularly at the time of the commission of each and all of the overt acts in this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of

said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said LI CHEUNG and YIK FAT, on or about the thirtieth day of January in the year of our Lord one thousand nine hundred and fourteen, brought into the port of San Francisco in the State and Northern District of California, from some foreign port or place to the Grand Jurors aforesaid unknown, seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes, contrary to law.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said LI CHEUNG and YIK FAT, on the thirtieth day of January in the year of our Lord one thousand nine hundred and fourteen, on the steamship "China," then and there lying and being in the port of San Francisco in the State and Northern District of California, prepared seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes which said opium had [6] theretofore been brought into the United States from some foreign port or place to the Grand Jurors aforesaid, unknown, contrary to law for the purpose of causing the same to be delivered to the said JUNG QUEY, alias Sam Kee.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object

thereof, the said LI CHEUNG and YIK FAT, on the thirtieth day of January, in the year of our Lord one thousand nine hundred and fourteen, on the steamship "China," then and there lying and being in the port of San Francisco, in the State and Northern District of California, then and there delivered seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes, to one H. Matthaei, a quartermaster on said steamship "China," for the purpose of having the said opium delivered to the said JUNG QUEY, *alias* Sam Kee.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said MON HING and JT YEE, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and fourteen, at the City and County of San Francisco, in the State and Northern District of California, received seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes, which said opium had theretofore been brought into the United States from some foreign port or place to the Grand Jurors aforesaid unknown, contrary to law, by the said LI CHEUNG and YIK FAT.

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United [7] States of America in such case made and provided.

JNO. W. PRESTON,
United States Attorney.

Names of Witnesses Appearing Before the Grand Jury: J. A. Olivier, T. R. Harrison, H. Matthaei, A. V. Kircheisen.

[Endorsed]: A True Bill. J. G. Martin, Foreman Grand Jury. Presented in Open Court and Filed Feb. 6, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [8]

In the United States District Court, Northern District of California, First Division.

No. 5439.

THE UNITED STATES,

Plaintiff,

vs.

JUNG QUEY, *alias* Sam Kee et al.,

Defendants.

**Demurrer of Defendant Jung Quey, alias Sam Kee,
to Indictment.**

Now comes the defendant Jung Quey, *alias* Sam Kee and demurs to the indictment herein, and to each Count thereof, on the grounds:

1. That the first Count of said indictment does not state facts sufficient to constitute a public offense by defendant.

2. That said first Count of said indictment does not allege any overt act as done knowingly or fraudulently, nor does it allege any overt act which could be in furtherance of any conspiracy "to import opium."

3. That the second Count of said indictment does

not state facts sufficient to constitute a public offense by defendant.

4. That said Count of said indictment does not allege any overt act to have been done knowingly or fraudulently.

WHEREFORE defendant asks that this demurrer be sustained as to each Count, and the indictment dismissed.

WM. HOFF COOK,

Attorney for said Defendant.

Receipt of a copy of the within demurrer is hereby admitted this 17th day of February, 1914.

JNO. W. PRESTON,

United States Attorney.

[Endorsed]: Filed Feb. 17, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [9]

In the United States District Court, Northern District of California, First Division.

No. 5439.

THE UNITED STATES,

Plaintiff,

vs.

JUNG QUEY, alias SAM KEE et al.,

Defendants.

Demurrer of Defendants Li Cheung and Yick Fat to Indictment.

Now come the defendants Li Cheung and Yick Fat and to demur to the indictment herein, and to each count thereof, on the grounds:

1. That the first count of said indictment does not state facts sufficient to constitute a public offense by defendant.

2. That said first count of said indictment does not allege any overt act as done knowingly or fraudulently, nor does it allege any overt act which could be in furtherance of any conspiracy "to import opium."

3. That the second count of said indictment does not state facts sufficient to constitute a public offense by defendants.

4. That said second count of said indictment does not allege any overt act to have been done knowingly or fraudulently.

WHEREFORE defendant asks that this demurrer be sustained as to each count, and the indictment dismissed.

WM. HOFF COOK,
Attorney for said Defendant.

Receipt of a copy of the within demurrer is hereby admitted this 17th day of February, 1914.

JNO. W. PRESTON,
United States Attorney.

[Endorsed]: Filed Feb. 17, 1914. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [10]

In the United States District Court, Northern District of California, First Division.

No. 5439.

THE UNITED STATES,

Plaintiff,

vs.

JUNG QUEY, alias Sam Kee et al.,

Defendants.

**Demurrer of Defendants Mon Hing and Yt Yee to
Indictment.**

Now come the defendants Mon Hing and Yt Yee and demur to the indictment herein, and to each count thereof, on the grounds:

1. That the first Count of said indictment does not state facts sufficient to constitute a public offense by defendants.

2. That said first Count of said indictment does not allege any overt act as done knowingly or fraudulently, nor does it allege any overt act which could be in furtherance of any conspiracy "to import opium."

3. That the second Count of said indictment does not state facts sufficient to constitute a public offense by defendants.

4. That said second Count of said indictment does not allege any overt act to have been done knowingly or fraudulently.

WHEREFORE defendant asks that this demurrer be sustained as to each Count, and the indictment dismissed.

WM. HOFF COOK,
Attorney for said Defendant.

Receipt of a copy of the within demurrer is hereby admitted this 17th day of February, 1914.

JNO. W. PRESTON,
United States Attorney.

[Endorsed]: Filed Feb. 17, 1914. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [11]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the Courtroom thereof, in the City and County of San Francisco, State of California, on Monday, the 9th day of March, in the year of our Lord One Thousand Nine Hundred and Fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5441.

U. S.

vs.

JUNG QUEY et al.,

Order Overruling Demurrer.

The demurrer to the indictment herein having been heretofore submitted to the Court for decision, now after due consideration had, by the Court ordered that said demurrer be, and the same is hereby overruled. [12]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the Courtroom thereof, in the City and County of San Francisco, State of California, on Friday the 13th day of March, in the year of our Lord One Thousand Nine Hundred and Fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5441.

U. S.

vs.

JUNG QUEY *alias*, etc., LI CHEUNG, YIT FAT,
MON HUNG and JT YEE.

Pleas of Not Guilty.

Each of the defendants herein being present with his counsel, W. H. Cook, Esqr., each of said defendants then and there pleaded not guilty, and by the Court ordered that said pleas be, and the same are hereby entered. Further ordered that the trial of this case be set for April 10, 1914. [13]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 5441.

THE UNITED STATES OF AMERICA,

vs.

JUNG QUEY et al.

Verdict—April 13, 1914.

We, the Jury, find JUNG QUEY, LI CHEUNG, YIT FAT, MON HING and JT YEE, the defendants at the bar, NOT GUILTY on first Count.

W. S. HANHIDGE,

Foreman.

[Endorsed]: Filed April 13th, 1914, at 9 o'clock and 45 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [14]

[Minutes of Trial—June 10, 1914.]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the Courtroom thereof, in the City and County of San Francisco, State of California, on Wednesday, the 10th day of June, in the year of our Lord One Thousand Nine Hundred and Fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5441.

UNITED STATES OF AMERICA

vs.

JUNG QUEY, LI CHEUNG, MON HING, and
JT YEE.

Impanelment of Jury, etc.

This case this day came on regularly for trial, upon being called both parties answered ready for trial. The defendants Jung Quey, Li Cheung and Mon Hing were present in open court with their attorney, Wm.

Hoff Cook, Esq. The absence of defendant Jt Yee was allowed by the Court, over the objection of the United States Attorney, upon the statement of Mr. Cook. John W. Preston, Esq., was present on behalf of the United States. Mr. Cook then moved the Court to excuse all jurors called or impaneled in the former trial of these defendants on April 10th, 1914, which said motion the Court ordered denied, but ordered that the following named persons, S. H. Lohsen, Thos. J. Welsh, H. E. Sanderson, James H. Brady, Geo. M. Rolph, Irving H. Khan, Chas. J. Bandmann, F. T. Bowers, Wm. S. Hanbridge, Joseph H. Handlon, Dixwell Hewitt, Leo Pockwitz, who were the jurors impaneled in the former trial of this case be, and they are hereby, excused from attendance upon the Court until June 15th, 1914, at 10 o'clock A. M. Mr. Cook then interposed "Pleas of Former Acquittals" as to each defendant. The Court then ordered that the jury box be filled from the regular Panel of Trial Jurors, as it now remains. Thereupon the following named persons were duly called, sworn and examined, viz.: William J. Dutton, D. R. Mc Niel, Wm. N. McCarthy, P. A. Dinsmore, George L. Center, Thomas Dillon, K. H. Plate, Leroy W. Jackson, C. R. Johnson, J. G. Barker, Peter A. Smith, D. C. Dorsey. D. R. Mc Niel was excused by the Court at the request of the defendants. Angelo J. Rossi was then called, sworn and examined. William J. Dutton was, at the request of the defendants, excused by the Court until June 18th, 1914, at 10 o'clock A. M. J. H. Taylor, was then duly called, sworn and examined. Peter A. Smith was excused

by the Court, at the request of the defendants. [15] Alfred P. Hampton was then called, sworn and examined. Wm. N. McCarthy was excused by the Court at the request of the defendants. J. T. Drennan was then called, sworn and examined. K. H. Plate was excused by the Court, at the request of the defendants. C. M. Volkman was then called, sworn and examined. George L. Center was excused by the Court, at the request of the defendants. The regular Panel of Trial Jurors having been thus exhausted, the Court ordered that a Special Venire issue herein for the appearance of ten persons to serve as trial jurors and that the United States Marshal go into the streets and highways and summon ten such persons to act accordingly. Subsequently, the said United States Marshal returned into court and made return that he had summoned the following named persons to appear as heretofore ordered, viz.: Michael Mulloy, Thomas Morton, R. E. Shaw, Fred A. Deremer, Percy F. Morris, E. F. Bayles, H. K. Burgess, Sam Heyman, W. R. Bacon and J. A. Bried, and upon being called in open court, each of said persons answered present with the exception of Michael Mulloy, who had been previously excused by the Court for cause. Thereupon, the Court ordered that the further impanelment of a jury in this case do proceed. W. R. Bacon was then called, sworn and examined. C. R. Johnson was excused by the Court at the request of the defendant. H. K. Burgess was then called, sworn and examined and excused by the Court for cause. Percy F. Morris was then called, sworn and examined. W. R. Bacon was excused by the Court

at the request of the defendants. J. A. Bried was then called, sworn and examined. C. M. Volkman was excused by the Court at the request of the defendants. Sam Heyman was then called, sworn and examined. J. H. Taylor was excused by the Court at the request of the defendants. Fred A. Deremer was then called, sworn and examined. Thereupon, the Jury being complete and composed of the following named persons they were accordingly duly sworn to try the issues joined in this case, viz.: P. A. Dinsmore, Thomas Dillon, Leroy W. Jackson, J. G. Barker, D. C. Dorsey, Angelo J. Rossi, Alfred P. Hampton, J. T. Drennan, Percy F. Morris, J. A. Bried, Sam Heyman and Fred A. Deremer. Mr. Preston stated the case to the Court and jury. Mr. Cook then introduced in evidence the Indictment and Verdicts of the previous trial. Mr. Preston then called L. L. Pokorney, Bernice E. Jennings and H. Matthaei, who were each duly sworn and examined, and introduced in evidence a certain card which was filed and marked United States Exhibit No. 1 for identification. Thereupon, the hour of adjournment having arrived the Court ordered that the further hearing of this case be, and the same is hereby, continued until June 11th, 1914, at 10 o'clock A. M.

[16]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the Courtroom thereof, in the City and County of San Francisco, State of California, on Thursday the 11th day of June, in the year of our Lord One Thousand Nine Hundred and Fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5441.

UNITED STATES OF AMERICA

vs.

JUNG QUEY et al.

[Minutes of Trial—June 11, 1914.]

The trial of this case was this day resumed. All of the defendants were present, as well as the attorneys for the respective parties and jury complete. H. Matthaei resumed the stand on behalf of the United States and was further examined. Mr. Preston then called George J. Springer, Henry Gemmer, J. T. Stone, Joseph Head, George Williams and Young Kay, who were each duly sworn and examined, and introduced in evidence exhibits which were filed and marked as follows: United States Exhibit 2 (for identification), 3, 4, 5 (for identification), 6 (for identification), 7, 8, and 9. Mr. Cook then called defendant Jt Yee, L. H. Grau, and C. M. Landers, who were each duly sworn and examined on behalf of defendants. Mr. Preston then called A. V. Kircheisen, who was duly sworn and examined on behalf of the United

States. Thereupon, the hour of adjournment having arrived, the Court ordered that the further hearing of this case be, and the same is hereby continued until June 12th, 1914, at 10 o'clock A. M. [17]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the Courtroom thereof, in the City and County of San Francisco, State of California, on Friday the 12th day of June, in the year of our Lord One Thousand Nine Hundred and Fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5441.

UNITED STATES OF AMERICA

vs.

JUNG QUEY et al.

[Minutes of Trial—June 12, 1914.]

Defendants Jung Quey, Li Cheung and Mon Hing were present, the absence of Jt Yee having been heretofore allowed by the Court. The attorneys for respective parties were present and the jury complete. Mr. Cook called D. F. Belden who was duly sworn and examined. Mr. Preston then called Charles W. Brown and Thomas R. Harrison, who were each duly sworn and examined on behalf of the United States. Thereupon Mr. Preston rested the case for the United States. Mr. Cook called Mon Hing (defendant) and James W. Finn, who were each duly sworn and examined on behalf of defend-

ants. D. D. Jones was duly affirmed as Chinese Interpreter herein, and thereupon Mr. Cook called defendants Yik Fat, Li Cheung and Wong Chung, who were each duly sworn and examined, *thru* interpreter, on behalf of defendants, and thereupon Mr. Cook rested their defense. Mr. Preston called in rebuttal Joseph Head, H. Matthaei, Li Cheung and John Toland, who were each examined accordingly. The case was then argued by Mr. Preston and Mr. Cook and submitted. The Court then charged the jury and instructed [18] them to return a verdict for each of the defendants upon their plea of former acquittal for the charge on the first count of the Indictment and also return a verdict for each of the defendants upon his plea of former acquittal of conspiracy with Yik Fat herein. The jury thereupon at 5 o'clock and 40 minutes P. M. retired to deliberate upon their verdict and subsequently returned into court at 6 o'clock and 30 minutes P. M., and asked that a certain portion of the testimony of defendant Jt Yee be read to them which request was by the Court granted and again they retired at 6 o'clock and 40 minutes P. M. and after due deliberation had thereupon returned into court at 6 o'clock and 55 minutes P. M. and upon being called all jurors answered to their names and were found to be present and upon being asked by the Court if they had agreed upon a verdict answered in the affirmative and presented three written verdicts which the Court ordered filed and recorded, which said verdicts were in the words following:

"We, the Jury, find Jung Quey, Li Cheung, Mon Hing and Jt Yee, the defendants, at bar, Guilty on the Second Count of the Indictment herein. John G. Barker, Foreman."

"We, the Jury, find for the defendants at the bar upon their pleas of former acquittal of the offenses charged in the First Count of the Indictment. John G. Barker, Foreman."

"We, the Jury, find for each of the defendants at the bar upon his pleas of former acquittal of conspiracy with Yok Fat alone.

"JOHN G. BARKER,
Foreman."

At the request of Mr. Cook the Court ordered that defendants Jung Quey, Li Cheung, Mon Hing and Jt Yee be allowed to go on the bonds heretofore given in this case, and that they be and appear in court on June 19th, 1914, at 2 o'clock P. M. for judgment.
[19]

The Court further ordered that the jurors in this case now serving on the regular panel of this court be, and they are hereby excused from further attendance upon the Court until June 15th, 1914, and that the four special talesmen who served herein be, and they are hereby, excused from further attendance upon the Court. The Court further ordered that the United States Marshal for this District pay the persons hereinafter named, who were summoned on the Special Venire herein, the sums set opposite their respective names, being the amounts due them for their appearance and services as trial jurors in this case, and that the clerk of this Court issue certificates

accordingly, to wit: Percy F. Morris, J. A. Bried, Sam Heyman and Fred A. Deremer, the sum of \$9.00 each. Michael Mulloy, Thomas Morton, R. E. Shaw, E. F. Bayley, H. K. Burgess and W. R. Bacon, the sum of \$3.00 each. [20]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY, *alias* Sam Kee, LI CHEUNG, MON
HING and YT YEE,

Defendants,

**Bill of Exceptions of Proceedings had Upon the Trial
of the Cause.**

Be it remembered that this cause came on for a second trial upon June 10th, 1914, and John W. Preston, Esq., United States Attorney for the Northern District of California, appeared and represented the plaintiff, and Wm. Hoff Cook, Esq., appeared and represented the defendants.

It then and there duly appeared to the Court that the defendants had been previously placed upon their trial upon the indictment in this cause, and that upon such trial the jury had found all of the defendants "not guilty" upon the first count of said indictment, and found the defendant, Yick Fat, "not guilty" upon the second count of said indictment, and the

jury upon said trial were unable to agree upon a verdict as to the defendants Jung Quey, *alias* Sam Kee, Li Cheung, Yt Yee and Mon Hing, upon the second count of said indictment. And that upon the impanelment of the jury upon said first trial of said cause that four talesmen were challenged by defendants by peremptory challenges, and that the names of said four talesmen were challenged by defendants by peremptory challenges, and that the names of said four talesmen so peremptorily challenged were in the jury-box and likely to be [21] called as prospective jurors upon the second trial of said cause.

That under the aforesaid circumstances and conditions the attorney for the defendants, prior to the clerk drawing any names from the jury-box for the second trial of said cause, requested the Court to order the clerk to withdraw from said box the names of said four talesmen so peremptorily challenged upon the first trial of said cause. Said request was made upon the grounds that necessarily the defendants would be obliged to again peremptorily challenge said four talesmen if called to qualify as jurors upon said second trial, with the result that the defendants would in reality, under the existing conditions, be only allowed six free peremptory challenges, instead of ten free peremptory challenges as allowed by law. Such request on behalf of defendants was by the Court denied, to which ruling defendants duly excepted.

Thereupon an impanelment of the jury was commenced, and said four names of said talesmen so peremptorily challenged were again called among the

first twelve talesmen drawn from the box for examination as to qualifications to serve as jurors upon said second trial. That defendants were obliged to and did again exercise peremptory challenges as to three of said talesmen so peremptorily challenged as aforesaid upon said first trial, and the fourth of said talesmen was sworn and impaneled as a juror upon said second trial; and before the jury was impaneled and completed, and before said fourth talesman was sworn and impaneled, the ten peremptory challenges allowed to defendant by law had not all been exercised, the defendants had exercised the ten peremptory challenges allowed by law. [22]

That after said jury had been impaneled said United States Attorney, on behalf of the plaintiff, made his opening statement to the jury.

That upon the conclusion of said opening statement the following proceedings were had:

Mr. COOK.—At this time and on behalf of the defendants I desire to introduce in evidence the indictment in this case, together with the verdict of acquittal of the first count of this indictment, and of the acquittal of the defendant Yick Fat on the second count of the indictment, and the disagreement of the jury upon the second count as to all of the defendants.

Mr. PRESTON.—That is part of your defense.

Mr. COOK.—I am asking that it be considered not in evidence. I desire the testimony as to any acts or statements of Yick Fat as binding these parties as having been an acquittal of these parties of any conspiracy; that is, the acquittal of Yick Fat as being an acquittal of these defendants of any conspiracy as

alleged in the indictment with the man acquitted. In other words, the acquittal was an acquittal of these defendants in connection with Yick.

That thereupon said record so offered on behalf of defendants was by the Court admitted in evidence.

Thereupon the following proceedings were had:

[Testimony of L. L. Pokorney, for Plaintiff.]

L. L. POKORNEY was called and sworn as a witness on behalf of the plaintiff, and testified as follows:

That he is a photographer and has been living at Portland, Oregon, since March 27th, and that he was employed as a photographer at the Bushnell Studio at 1142 Market Street in San Francisco prior to that time.

Q. "Do you remember on or about the 3d day of February [23] 1914, of having in this building made the photographs of any Chinese?"

Mr. COOK.—Objected to as incompetent, irrelevant and immaterial. The Court. The objection is overruled. Mr. Cook.—Exception."

"A. I remember taking pictures; I do not remember just the day, but I remember taking some pictures.

Mr. Preston. Q. Was it about that time? A. Yes,

sir. Q. I will ask you whether or not you recognize any of the Chinese in the room whose photographs you made at the time? Mr. Cook.—The same objection. The Court overruled. Mr. Cook.—Exception.

A. I remember the tall fellow there in the center of the three. Mr. Preston. (Addressing the defendant.) Stand up. Q. Is that the one? A. Yes, sir.

Q. I will ask you whether or not there was any other

(Testimony of L. L. Pokorney.)

Chinaman you photographed at the same time? A. There was a short fellow, much shorter than he is whose picture was taken at the same time his was.

Q. Do you remember at whose request you made these photographs? Mr. Cook. --Objected to as incompetent, irrelevant and immaterial. The Court. Over-

ruled. Mr. Cook. Exceptions. A. We used to get the calls from the Marshal's office who requested the studio to send a man up here with the camera to take these pictures; I do not know who it was that called up. Mr. Preston. Q. Do you remember whether or

not Mr. Cook was then present? A. I do not remember. Q. Do you remember whether or not you collected any money? A. Yes, sir; I collected \$4.00.

Q. Do you remember from whom you collected it? Mr. Cook. The same objection, that it is incompetent, irrelevant and immaterial; these photographs were taken at the request of the Marshal and the matter of who paid for them is entirely immaterial. Mr.

Preston. I want to show it was during the conspiracy. Mr. Cook. --It was after it ended. Mr. Preston. It is not. Mr. Cook. -It is when the men were

before the commissioner. Mr. Preston. -This was during the continuance of [24] the conspiracy.

The Court. -I thought this conspiracy was in January. Mr. Preston. It began in January and continued all the time mentioned in the indictment. The

conspiracy was still in operation. The Court. What is the time set in the indictment? January, 1914, as I understand the indictment; it was during all the times mentioned in the indictment. Mr. Cook. -This was

(Testimony of L. L. Pokorney.)

on the arrest of the men before the Commissioner. They were charged with a subsequent offense. The Grand Jury never indicted them; they took the photographs at that time as they always do; the Marshal sent for the photographer. They always take the pictures of Chinese defendants and not of the other defendants. The Court. There is no way of fixing a definite time. The Government is not bound to give its proof of the specific day. Mr. Preston. There was no preliminary hearing on this charge at all. Mr. Cook. There is no overt act alleged after the 31st day of January. Mr. Preston. That is true. The question is whether or not we are shut out subsequent to January 31st. The Court. I do not know what the nature of your offer is. Mr. Preston. We are trying to show that this other defendant, Sam Kee, paid for these photographs. Mr. Cook. I object to the statement. Mr. Preston. That is the time while the conspiracy was in full operation; nobody under arrest at all on that charge except these two. I would like to offer the receipt. It is a matter for the Court to consider, and let the witness be excused. Mr. Cook. Objected to as incompetent, irrelevant and immaterial. The only allegation in the indictment of overt acts taken place are on the 31st of January of this year. The United States Attorney alleged and stated to the jury the only three overt acts he relied upon. Mr. Preston. Because they are not overt acts does not make any difference. The Court. They [25] are offered to show that one of these defendants came to the rescue of the others by the payment of money.

(Testimony of L. L. Pokorney.)

Mr. Preston. Yes, another transaction not connected with this. The Court. The objection is sustained. Mr. Preston. We want to show that Mr. Cook here paid for the photographs at that time and when Mr. Sam Kee was arrested the receipt was in Sam Kee's pocket. The court. That is a round-about way. Mr. Preston. To show when Sam Kee takes the stand and says he did not know these men he did know them. The Court. That might suffice for rebuttal. Mr. Preston. I would like to identify this receipt. Mr. Cook. No objection identifying this other paper. Mr. Preston. I wish to show the piece of paper he gave Mr. Cook at the time. The Court. If it is only for the purpose of offering this in rebuttal. Mr. Preston. Simply to identify it now for the purpose of hereafter using it if we can. Q. I show you here a paper, in whose writing is that? A. That is my writing. Q. To whom did you give that paper? A. It says W. H. Cook, but I could not identify the gentleman. Mr. Cook. It was Mr. Waldstein, the gentleman over there, who is connected with my office? A. I don't know. Mr. Preston. Q. Was that \$4.00 for the picture of this Chinaman and the other one? A. Yes, sir. It is quite unusual that a receipt is given as he paid me the money at the time. I recall he insisted on a receipt for it. Mr. Preston. We ask that it be marked as Exhibit 1 for identification. (The paper is marked "United States Exhibit 1 for identification.")

Cross-examination.

Mr. COOK.—Q. You don't know at all, do you, Mr.

(Testimony of L. L. Pokorney.)

Pokorney, what these photographs were for? A. No, sir; I never knew what those pictures were for.

Q. You simply knew you took two photographs and you came at the request of the Marshal to take them?

A. Yes, [26] sir. Q. And some gentleman requested a receipt for the \$4.00 from you in my name for the taking of these photographs? A. I do not know who it was; it was in that name.

Redirect Examination.

Mr. PRESTON.—Q. The Marshal did not pay you the money? A. No, sir, it was a total outsider that seemed to handle the case. He spoke to the men.

Q. You are not sure that Marshal ordered you over are you? A. No, sir."

[Testimony of Bernice E. Jennings, for Plaintiff.]

BERNICE E. JENNINGS, was called as a witness on behalf of the plaintiff, and sworn and testified as follows:

My name is Bernice; My Chinese name is Chang. My given name is besides Chang is Jennings.

Q. You go by the name of Bernice Jennings? A. Yes, sir.

Mr. COOK.—At this time I desire to object to any evidence in this case under the indictment on the part of the prosecution on the ground that the offense as charged of the conspiracy to conceal opium after importation is an unconstitutional act and not an offense within the Federal jurisdiction. The Court. Overruled. Mr. Cook. Exception.

Mr. PRESTON.—Q. Do you know this man here, Sam Kee or Jung Quey. A. Yes, sir.

(Testimony of Bernice E. Jennings.)

He is my father; I live at 742½ Washington Street in an apartment house and I lived in the same place in January and February of this year. Four rooms in that house are occupied by my father and his family; The numbers of those rooms are 15 and 19: Four rooms with two numbers only. There was a telephone number in room 17 in my name: There has always been a number on that room.

Q. What is the number of the telephone that is in room 17? Mr. Cook. Objected to as incompetent, irrelevant and immaterial. [27]

The COURT.—Overruled. Mr. Cook. Exception. A. Kearney 5484.

There are two rooms that have the same number 17; and two rooms had one number 15; and two rooms had one number 19.

A bunch of girls live there in No. 17. My father had another telephone numbered China 1217. All the girls have that room like a club, and there are Chinese and live in town, but they have American names like Margaret, Irene and Sue.

The purpose of having this telephone was that we had some friends from the country who live out of town; we did not want to bother my father's telephone so all of us girls put it in. The suite of rooms numbered 17 are fitted up so that one is a parlor and the other a bedroom. We girls pay the rent, which is \$3.00 a month; and we pay for the telephone: The room is \$11.50 and the telephone \$2.50 and we rent a piano at \$3.00, making \$17.00 a month in all; and six of us pay this amount, and we each pay \$3.00 a

(Testimony of Bernice E. Jennings.)

month. The landlord is a Chinaman named Wong Fook; and my father has nothing to do with it. I have earnings of my own. I adopted an American name just because I wanted to: Other girls do the same; one of the girls is called Miss Hall. We do not use a Chinese numbered telephone because we have all American friends out of town and we wanted to telephone we always had to use the Chinese telephone, so we got a new telephone. We did not want to bother other people every time we wanted to telephone. I speak Chinese, but talk mostly English to my friends.

Cross-examination.

There is no other room there No. 17. There is another room 16. The telephone is a nickle in the slot telephone. We have a piano and the members of the club play the piano and have music, and we have the rooms as social rooms, and place of meeting.
[28]

Redirect Examination.

Are club rooms are between the rooms of my father and mother. Some man has room 16, I don't know him.

[Testimony of H. Matthai, for Plaintiff.]

H. MATTHAI, called as a witness on behalf of the people, and sworn, and testified as follows:

Twenty-four years old and a quartermaster and have been going to sea for ten years. In January and February, 1914, I was quartermaster on the Steamer "China," and have been for a little over a year. That steamer goes between San Francisco and

(Testimony of H. Matthai.)

Honolulu, the Orient, Japan and China. She returned to San Francisco on January 26th, 1914. There were four quartermasters, and one of them named Kirchisen roomed with me. I know the defendants. Defendants Li Cheung was storekeeper's boy on the steamer. The storekeeper's room is aft; my room is forward under the forecastle, and the storekeeper's is below deck. I had a conversation with Li Cheung in regard to opium about January 28th when the "China" was at pier 42 at 3rd and Townsend Street in San Francisco. The conversation was in the storekeeper's room: We were alone at the time. He said he wanted to take some opium ashore the next day. I said "I don't know," and he gave me a letter the same evening. He wrote the letter in the storekeeper's room. He gave me the letter between 8 and 9 o'clock in the evening. I took the letter to 749 Clay Street. He told me to take it there. There was a name in English written on there, Wing Hing Lung Company. Before I did anything with the letter I showed it to the chief officer of the vessel, named Maloney. I also showed it to Captain Head of the custom house. I gave it to him Friday morning, and got it back Friday afternoon. He kept it three or four hours. After I got it back I took it to 749 Clay Street, and showed it to Sam Kee one [29] of the defendants. He was not there when I got in. There was a young fellow in the store, and I showed it to him. There was a name written in Chinene. I said I wanted to see that man. He told me to sit down and wait awhile, and Sam Kee came

(Testimony of H. Matthai.)

in, when I gave him the letter. He told me before he read it to sit in the back so people could not see me from the street. He said, "sit further back in the chair." I sat down where he told me in the store not so close to the door. He read the letter, and he told me to come with him and took me in the back room on the same floor. It was a dark room and I could not see very much, I sat down on what looked like an old bed. He said did I have the stuff? I said, "I have not got it but I can get it." He said "Where are you going to take it?" I says, "I don't know, anywhere you want me to." I don't exactly remember any more that was said. He went out then and told me to wait awhile, and I waited in this dark room. Before he went away he gave me a little piece of paper and wrote something in Chinese on it. He was gone about half an hour. He did not come back himself.

Q. What kind of message did you receive?

A. The telephone rang, and this fellow who was in the store, he came to the back room and told me to go to Grant Avenue and Clay Streets. Mr. Cook. I object to that, what this man said, and anything he said or done outside of the presence of the defendant, and ask the answer be stricken out. The Court. Objection overruled and motion denied. Mr. Cook. Exception.

I could not hear what was said over the telephone the man was talking in Chinese. I left and went to Grant Avenue and Clay Street and saw Sam Kee, and he showed me the defendant Mon Hing and said that

(Testimony of H. Matthai.)

was the man who was going to get the stuff and he said "go and talk with him." At that time Mon Hing was at Grant [30] Avenue and Clay Street. He was not with Sam Kee. He was diagonally across the street from where were. I went toward him and he left me. Sam Kee did not go with me but walked along Grant Avenue. There was nothing said between Sam Kee and myself about the price. He asked me how much I had and I said, "I have not got anything but I think I can get 28 cans. Mon Hing asked me where he could come and get the stuff, and I told him that I didn't know, and he says "go and get the stuff first, and then ring up on the telephone where we are going to meet." He told me to ring up Kearney 5484. That is Sam Kee told me that before I left the store and he gave me a piece of paper with the telephone number on, but I don't know what has become of it. It was like the one just shown to me. After Mon Hing left I took the letter to the Custom House and gave it to Captain Head, and about half an hour later he gave it back to me. I gave the letter to my mess-boy and told him to give it to Li Cheung. He gave it to the Doctor's boy Yick Fat. That was on Friday. Between two and three o'clock that afternoon Kirchisen was in my room and Li Cheung brought in a bag that looked like a potato bag; I do not know whether anyone else was outside the door at that time. The bag had opium in it; that is there were seven bladders in it. (Here the witness is shown a grip or suitcase.) I have seen that grip before; it belongs to my partner Kirchisen.

(Testimony of H. Matthai.)

(Here witness was shown some bladders taken by the U. S. Attorney from the the aforesaid grip.) Those resemble the bladders which Li Cheung brought into my room. They were supposed to contain 28 cans of opium. He said it was 21, and I said "It could not be," and we finally agreed that there were 28 and he said he was going to give me \$7.50 a can to take it ashore. He agreed to give me \$196.00. (Here the witness was shown some rags which the U. S. Attorney took from the same grip.) I recognize [31] those two rags as being the rags that covered the bladders when they were brought to my room. There was a letter written in connection with the matter by Li Cheung which I gave to Captain Head. After I received this letter which Li Cheung wrote in my room I took the suitcase and contents ashore, and showed it to the customs officer at the gangplank first. His name was Williams. Then I took it while Mr. Harrison, a customs inspector, accompanied me over to the Southern Pacific Depot at 3d & Townsend Streets. I telephoned to Kearney 5484, and a girl answered the phone and I asked when they were coming up to get it. I said I could not come to Chinatown, and they agreed finally to come out where I lived at 20th & Illinois Street. That night I called up the same number again about 7:30 from the Olympia Hotel. I called up twice from 3d & Townsend Streets. The second time about an hour after the first time. I then asked when they were coming to get it. The first time they did not tell me a word about it; they told me to call up again in about an hour. The agreement was to come out to where I

(Testimony of H. Matthai.)

lived between 7 and 8 o'clock, at the Olympia Hotel. The same voice answered the telephone in the evening; they said they could not come, their house was watched. I did not make any arrangement for future delivery that night. The next morning or afternoon I called up for the fourth time from Pier 42, where the boat was docked. A girl answered the phone. I made the same arrangement as before to come out between 7 and 8 that Saturday night. The suitcase and contents were again placed by Mr. Harrison in my room in the Olympia Hotel that evening. That night I met Mon Hing and Yt Yee outside the Olympia Hotel door on the street. I shook hands with them, and asked them if they would come in and have a drink, and they did. Then I took them up to my room. When I got in my room I took the suitcase from under my bed and opened it up for Mon Hing. He said he could not take it then, [32] I should take it outside. I asked whether he had any money, and he said, "Yes." I did not deliver it to him in the room and did not have any understanding as to where I was to deliver it to him. I took it out on the street, and walked up 20th Street to Kentucky Street, and at that corner I saw Mon Hing and Yt Yee. They were on the opposite side of the street. Near the Southern Pacific viaduct on Kentucky Street I delivered the grip to Yt Yee, and Mon Hing paid me \$196.00, while Yt Yee walked away with the grip. I did not see them any more after that, and that ended the transaction. I divided the \$196.00 with Kirchisen, each taking half. Later I gave \$70.00 of mine to Captain Stone of the Customs Ser-

(Testimony of H. Matthai.)

vice. I gave the identical gold to Captain Stone that I received from the Chinaman. When I was talking to Sam Kee he told me that when the man came if he didn't have all the money to come down to my store and get the rest. Q. Had there been any talk between you and this defendant Li Cheung, or between Li Cheung and any other person in your presence before the steamer "China" reached San Francisco?

Mr. COOK.—Objected to on the ground that it is incompetent irrelevant and immaterial. The Court. Objection overruled. Mr. Cook. Exception. A. Yes, sir. Q. Where was it, and how many days out? A. I think it was between Yokohama and Honolulu. Q. What was the nature of the conversation. (Defendant made the same objection; it was by the Court overruled, and defendant excepted.) A. He asked me if I would be able to take something ashore for him in San Francisco. He did not say whether he had anything, but whether I could take it ashore or not. When those two defendants came into my room Inspector Harrison was concealed in the closet in my room. At the time they were in my room I counted the skins in the suitcase, and there were seven skins in it, and they were in it when I gave the [33] suitcase to Yt Yee, and *there* are and were similar to the skins and bladders which were shown to me here in the courtroom.

Cross-examination.

Mr. COOK.—At this time, I move to strike out, if the Court please, the testimony of this witness with

(Testimony of H. Matthai.)

relation to any of the overt acts, in relation to the first and second overt act alleged in the indictment, on the ground that it is incompetent, irrelevant and immaterial, and on the ground it appears affirmatively in evidence in this case that Yick Fat was acquitted by a jury in this cause of any conspiracy, combination, consideration or agreement as alleged in the second part of the indictment; that all of these defendants were acquitted of the offense charged in the first count of the indictment of conspiracy to import any of this opium into the United States, and that the second count of the indictment as to the overt act of the testimony of this witness in support thereof for the purpose it was offered by the United States Attorney is in support of the allegation of the overt act in furtherance of the further conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Li Cheung and Yick Fat, on the thirtieth day of January in the year of our Lord one thousand nine hundred and fourteen, on the steamship "China," then and there lying and being in the port of San Francisco in the State and Northern District of California, prepared seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes which said opium had theretofore been brought into the United States from some foreign port or place to the Grand Jurors aforesaid, unknown, contrary to law, for the purpose of causing the same to be delivered to the said Jung Quey, alias Sam Kee; and the second act alleged in pursuance of that conspiracy, that [34] Li Cheung and Yik Fat on the same day, at the same

(Testimony of H. Matthai.)

time and place, delivered seven skins or bladders containing fourteen pounds of opium to one H. Matthai, a quartermaster on the steamer "China." I submit under the evidence here there is no conspiracy whatever proved between anyone else than Yik Fat; no conspiracy proven between Sam Kee or Mon Hing at the time that any one of these acts testified to by this witness was concerned, nor as to any fact alleged as to these overt acts. That whatever was done there, was done, if it was done at all, was done in pursuance of a conspiracy solely between Yik Fat and Li Cheung, and the jury have found that no such conspiracy existed by reason of acquitting Yik Fat of conspiracy.

The motion was by the Court denied, and defendants duly excepted.

(Witness continuing on cross-examination.) I joined the "China" as quartermaster about January 9th, 1913, and at that time Kirchisen was a quartermaster on her. I knew him in the old country. It was he who suggested that I get the job of quartermaster on the Pacific Mail Company's steamers. I have been ashore at Honolulu on trips. Was very well acquainted with Kirchisen. Q. Why did you divide the money with Kirchisen? A. Because he knew that the trip before Li Cheung asked him whether he could take opium ashore for him. Q. Kirchisen was not in this. You were doing this with the Government; why should you be dividing money? A. He asked me at sea, "If you take it ashore, or I take it ashore, we will divide the money." I had never seen opium done up in skins or bladders before.

(Testimony of H. Matthai.)

I never saw Jung Quey till I went to the store on Clay Street, and never saw Mon Hing till I saw him at the corner of Clay and Dupont Streets. The name of my boy on the steamer was Ah Fat. The doctor's boy was Yick Fat. I had heard about my boy Ah Fat having been arrested for taking opium ashore; it was common knowledge [35] on the steamer. Any opium I took ashore from the "China" on January 29th or 30th, 1914, was taken ashore with the permission of the Custom authorities, and under promises from the Customs authorities that I would not get in trouble. I never met defendant Yt Yee till I met him near the Olympia Hotel that night. As a compensation for what I was going to do in the matter I was going to keep half of the money and Kirchisen was to get half, but there was no such understanding with the customs authorities before. They took some of the money from us afterwards as they said they wanted to use it as evidence. Getting this money was the incentive for doing what I did, and we were helping the Customs authorities. Kirchisen was not in my room when Li Cheung came in but he came in afterwards. Kirchisen was in and out of the room, and I don't remember whether the stuff was in the room when he first came in. I am sure there were seven bladders in the suitcase when I showed it to Mon Hing in my room. I had my quartermaster's uniform on the night I met Mon Hing and Yt Yee on 20th street. I did not expect to meet two Chinamen there, and did not ask why there were two. I did not have any talk with Yt Yee. The two Chinese left my room before I did that night. I closed the door after

(Testimony of H. Matthai.)

they went out, and then I took the suitcase and contents and went out. I did not see anything of Inspector Olivier when I went out. The two Chinese were on the opposite side of the street and opposite the Police Station at the corner of 20th and Kentucky Streets. I went from 20th Street to 18th Street and then two blocks down to Mariposa Street on Kentucky Street to the end of the viaduct where I gave the suitcase which has been shown me here. Li Cheung did not mention the name of Mon Hing or Jung Quey at any time.

Mr. COOK.—Do you remember the day the “China” was going to sail you [36] were subpoenaed by the Marshal to appear before the United States Commissioner as a witness upon the preliminary examination of these matters? A. I was subpoenaed by the Marshal about twenty minutes before the ship left. Q. Were you not standing on the deck near the gangplank and at about that time and was not Ah Fat who was your boy, and also called Chuck Fat, and Yick Fat near you, and did you not turn to Chuck Fat and say, “When you get to China you leave the ship and do not come back as there is too much trouble over the stuff and keep still”? A. No, sir, I never did.

[Testimony of George J. Springer, for Plaintiff.]

GEORGE J. SPRINGER was called and sworn on behalf of the plaintiff, and testified as follows:

I am employee of the Pacific States Telephone and Telegraph Company, and manager thereof. I have been at 742½ Washington Street and saw the telephone with the Number Kearney 5484 in room No. 17.

[Testimony of Henry Genner, for Plaintiff.]

HENRY GENNER was called as a witness on behalf of plaintiff, and sworn and testified as follows:

I am Supervisor of the paystation telephone. We have a paystation telephone at 3d and Townsend Streets in San Francisco, and daily records are kept of calls through that paystation. They are kept under my supervision and I have the records here for January 30th, 1914.

Q. What have you on January 30th with reference to Kearney 5484, if anything? (This question was objected to by defendants on the ground that it is incompetent, irrelevant and immaterial; and the question was by the Court overruled; and defendants duly excepted). A. On the 30th of January, between 3:30 and 3:45 a call for Kearney for 5484 was placed, completed and paid for, and [37] at 4:12 a similar call was placed, completed and paid for. That was at the 3d and Townsend Street station.

Mr. COOK.—We move the testimony be stricken out in relation to these calls placed at that time for that number as being incompetent, irrelevant and immaterial. The Court. The motion is denied. Mr. Cook. Exception.

[Testimony of J. T. Stone, for Plaintiff.]

J. T. STONE was called as a witness on behalf of plaintiff and sworn and testified as follows:

I am a deputy Surveyor of Customs, and have been about sixteen years, and was such on January of this year. I received money from a man named Matthai, and also from a man named Kirchisen; sixty from

(Testimony of J. T. Stone.)

the latter and \$70.00 from the former. Since then it has been in my possession and I have the particular money in my possession now which was given to me by them (producing it).

Mr. PRESTON.—We offer it in evidence. Mr. Cook. We object to the introduction of this money as being incompetent, irrelevant, and immaterial. The Court. The objection is overruled. Mr. Cook. We except.

I received this money in the early part of February of this year, about the sixth or seventh, the sailing day of the “China.”

Cross-examination.

I had met these men before, but did not tell them they could keep the money. There was nothing said about money to me. Neither of them told me they expected to get any money. I took the money from them under directions of the surveyor of the port. Mr. Wardell. They were on the wharf, at the end of the gangway. They had just been subpoenaed as witness in this matter. At no [38] time did Matthai tell me he was going to get \$196.00, or any other sum. There was no discussion with me about money one way or the other.

[Testimony of George Williams, for Plaintiff.]

GEORGE WILLIAMS, called as a witness on behalf of the plaintiff and sworn and testified as follows:

I am an inspector of customs, and was such on January 30th of this year. I know quartermaster Matthai. I remember on or about January 30th of

(Testimony of George Williams.)

this year his having passed down the gangplank with a suitcase. I put my mark on it. The suitcase now shown to me is the one with my mark on it. I had instructions to let him pass with the suitcase. I looked at the contents of the suitcase, and it had opium in it; it was in skins, and it was smoking opium and was in the kind of skins which you show me now.

Cross-examination.

The suitcase was lying down flat. The quartermaster pulled up the cover and I removed the cloth, saw the opium was there and passed it in that manner.

Mr. COOK.—Q. You saw the skins? A. Yes, sir. I did not count them and do not know how many there were; I just saw some bladders; I made no examinations to find out what kind of opium it was. I had seen smoking opium put up in that style before. I do not know and did not know from any examination I made, what kind of opium was in the bladders. These bladders look exactly as they did that day; from all appearances from the suitcase and the skins, they look identically the same. I did not put any mark on any bladders. He opened the suitcase, and I reached down and pulled some rags aside and saw some bladders there, and it appeared to me to be opium; I did not taste it, or anything like that; and I did not perforate any of the skins to [39] examine the contents. They told me it was opium, and I understood it was to be passed. The bladders were in the suitcase as they appear here to-day, and the bladders here in this suitcase shown to me look like those that were in the suitcase when I passed the suit-

(Testimony of George Williams.)

case. I concluded that it was opium. My mark on it was "W" with a cross through it. The mark I put on the suitcase indicated that I as a custom inspector had inspected the contents and had passed it as being permitted to land so that a man coming along with mark on it would pass anybody at the gate; that was the effect of the mark that I put on the suitcase. So far as I was concerned, or anybody at the gate at the pier was concerned, Matthai might have taken it anywhere, and not be subjected to any further inspection. Matthai and Kierchisen went ashore together at that time. I had never seen them before I saw them at the gangplank. I was told to pass to German quartermasters.

[Testimony of Joseph Head, for Plaintiff.]

JOSEPH HEAD, was called as a witness on behalf of plaintiff and sworn and testified as follows:

I am Captain of Inspectors in the Customs Service in the port of San Francisco and have been such about eighteen years. I am acquainted with the place known as 742½ Washington Street in San Francisco, and have probably visited the place fifteen times in the last three years. I know the room in the place in which there was a telephone known as Kearney 5484 and it was in that room in January of this year. That room had no number on the door. That room taking the sequence of rooms as disclosed by the numbers on other rooms would be 16; there was another room on this floor that was No. 16. It is across the hall and some distance, probably 10 or 15 feet from this room. I assisted [40] in making

(Testimony of Joseph Head.)

the arrest of Sam Kee, at the corner of Clay and Kearney Streets, and searched his person after he was arrested.

Mr. COOK.—Did you have any warrant? A. Did I have a warrant? Q. Yes, for his arrest? A. I was acting under the direction of the United States Marshal, the warrant was issued and in the possession of the Marshal at the time. I did not have any warrant at the time I arrested him and searched him, nor was the warrant there at that time, nor was the Marshal there.

Mr. PRESTON.—Q. You knew the warrant was issued? A. Yes, sir. Q. I show you this paper, and will ask you whether or not you found that on Sam Kee's person at the time he was arrested.

Mr. COOK.—Objected to upon the ground it is incompetent, irrelevant and immaterial and it was an illegal arrest, and no authority for this man to make an arrest. I demand the return of all papers taken from the person of this defendant either by search warrant or otherwise, the reason being there never was any warrant served for the arrest of this man or used in the arrest of this man. Mr. Preston. There was a warrant. Mr. Cook. There was none used. The Court. The objection is overruled. Mr. Cook. Exception. A. Yes, sir. Mr. Preston. We offer this in evidence as testimony to show that Sam Kee was connected with Kearney 5484, this being a slip of paper on which the words appear in writing "Kearney 5484." Mr. Cook. Objected to as being incompetent, irrelevant and immaterial and no

(Testimony of Joseph Head.)

proper foundation laid. The Court. The objection is overruled. (The paper is marked "United States Exhibit No. 4.") Mr. Preston. Q. I will ask you whether or not at that time you made this arrest, you found on the person of the defendant Sam Kee the paper I herewith show you? Mr. Cook. Objected to upon the ground it is incompetent, irrelevant and immaterial and no proper foundation laid. The Court. [41] The objection is overruled. Mr. Cook. Exception. A. Yes, sir.

I did not know who Matthai was until January 30th of this year: On that day I received two papers from him, and also a slip of paper on which was written the words "Kearney 5484." Q. How did it compare in appearance, handwriting and otherwise, with the paper just introduced in evidence here as having been found on the person of Sam Kee? (Defendants objected upon the ground that it was incompetent, irrelevant and immaterial, and no proper foundation laid on connection made with this party. The objection was overruled and defendants duly excepted.) A. It was similar in general appearance and kind and size of paper, and written in lead pencil, and same style of writing, etc. When I got the first letter from Matthai I took it to Jung Kay, an interpreter in the immigration service in the Custom House for the purpose of translation, and I stayed until I got the translation: The paper now shown to me is a translation of Jung Kay, and it is typewritten on the machine in his office. I got this paper from Jung

(Testimony of Joseph Head.)

Kay, and he gave it to me as a translation of the letter I had taken from Matthai.

(This paper was marked "U. S. Exhibit No. 5 for Identification.")

The second paper you are showing me I have seen before: It is a paper given me by Jung Kay, and purports to be a translation of the second Chinese letter I gave him to translate. I gave him three letters to translate on that day. (The second paper is marked "U. S. Exhibit No. 6 for Identification.") On January 30th, 1914, I saw a suitcase at 3d and Townsend Street depot, which quartermaster Matthai had supposed to contain opium. I did not open it or examine its contents. Later that evening I saw the same suitcase, when inspector Harrison turned it over to me about [42] 8 o'clock, and I kept it till the next following afternoon, Saturday afternoon. When I received it I examined it, and it contained seven skins or bladders filled with opium, and some rags; and when it left my possession on Saturday afternoon the contents was the same as when I received it. I have had considerable experience with opium, and to the best of my knowledge the contents of this suitcase that I had between that evening and January 30th and the afternoon of January 31, was prepared smoking opium; and there is no doubt in my mind that it was prepared smoking opium; it had rags about it and it was about the same as the bladders you now show me, but it had not hardened then to any extent. I am positive that the suitcase here in court is the same suitcase I have been testifying about.

(Testimony of Joseph Head.)

Mr. PRESTON.—I don't believe that suitcase is offered in evidence if the Court please. We offer it now in evidence and ask that it be marked as Exhibit 7. Mr. Cook. Just the suitcase? Mr. Preston. The rags also. They were identified by Mr. Matthai. Mr. Cook. Objected to upon the ground that it is incompetent, irrelevant and immaterial as against all of the defendants, and also that no proper foundation has been laid. The Court. The objection is overruled. Mr. Cook. Exception. (The suitcase and rags are marked "U. S. Exhibit 7.") Mr. Cook. That is just the suitcase and rags, is it Mr. Preston? Mr. Preston. That is all at the present time.

I know that at 3d and Townsed Street depot on the afternoon of January 31st, Matthai did some telephoning; he telephoned first between 3:30 and 4 o'clock and rang up No. "Kearney 5484." I had the slip in my pocket and gave him the number to ring up.
[43]

Cross-examination.

There was no envelope on the paper that I received from Matthai on the morning of January 30th; it was just a single sheet of paper; it was all in Chinese characters and there was no English Street or number on any paper that he gave me at that time. I am positive that when Matthai gave me the paper that I have testified to that it was not contained in any envelope addressed to any particular person or any particular number. There was never any test made of the original package or contents of the suitcase when it was first given to me by inspector Har-

(Testimony of Joseph Head.)

rison: The first test of its contents was made in February within a day or two following the arrest of these defendants. I could not say whether this opium had been in Honolulu before it came to San Francisco. I saw the suitcase on the evening of January 31st at the Potrero Police Station, after ten o'clock, and Mon Hing and Yt Yee was there. I took part in the search along Kentucky Street after I saw the suitcase that evening. When I saw the suitcase that evening there were five skins or bladders of opium in it: Only five skins or bladders were found by the customs officers. I am positive that at the time I gave Harrison the suitcase to take out to the hotel there were seven skins in it. We found no opium of any kind in our search that evening after we left the Potrero Police Station. No United States Marshal or Deputy United States Marshal was with me when I arrested Jung Quey, and took him to 749 Clay Street and there searched him; and no one of those present at the time of his arrest had any warrant for his arrest, and we did not tell him what he was arrested for.

Redirect Examination.

Since the arrest of these parties this suitcase, and its [44] contents, have been kept in what is known as the seizure room of the Appraisers Building.

Q. What is the value of that kind of opium per skin, in the month of February? (Question objected to by defendant as incompetent, irrelevant, immaterial and the proper foundation not laid. Objection

(Testimony of Joseph Head.)

overruled, and defendants duly excepted.)

A. Between \$800 and \$900. Figuring it at 4 tins to a skin, it would be four times \$40.00, about \$160; it might be a little less or more; about \$160.00 a skin. I made the arrest of Jung Quey on February 3d.

[Testimony of Jung Kay, for Plaintiff.]

JUNG KAY, called as a witness for plaintiff and sworn and testified as follows:

I am 50 years old and have been in the United States 11 years. I am official interpreter of the Immigration Station and have been such for seven years at this port. I have made a study of the English language, and am able to translate the ordinary Chinese language into the English language, and the English into the Chinese. On January 30th, 1914, I translated for Captain Head a paper handed by him to me upon which paper appeared Chinese characters; and I made a correct translation, and gave him a copy of the translation; the paper you now show me is the translation I made, and is correct.

Mr. PRESTON.—We offer this in evidence now, and I will read it (defendants objected to the admission of the paper on the grounds that it was incompetent, irrelevant and immaterial, and no proper foundation laid. The objection was overruled, and the defendants duly excepted.)

Mr. PRESTON.—I will read it. (Reading.)
“Jung Quen, Dear Uncle: I am sending an American of the Steamer to bring this [45] paper. Please consult with this man when you see him and the paper

(Testimony of Jung Kay.)

and decide how the goods to be delivered and received. Tomorrow I will send you the goods by this man. By so doing it will not be disappointed. Upon receipt of this note, please send me words by this man, and we will know to be you by seeing the proof. Your nephew, You Ock (secret) from S. S. China."

Q. What is the Chinese character for nephew? A. Nephew is the son of a brother or the son of the cousin of that same generation. Is it customary for a man in China to sign himself "your nephew" when he is not related? (Defendants objected to the question as incompetent, irrelevant and immaterial, and speculative and called for the opinion of the witness. Objection was overruled, and defendants duly excepted.)

A. People that belong to another clan; my cousin's son I address nephew. Q. Do you address anybody

"nephew" who is not related to you by son of a brother?

A. No, sir, people that don't belong to the family. Q. What does You Ock mean?

A. That is a man's name. Q. Did it have something on there

to indicate steamship "China"? A. Yes, sir. Q.

What is "secret" in parenthesis here. A. Secret;

only these people; not leak out, but this should be

kept secret. There was some Chinese character on

the paper that caused me to put the word "secret"

there as a translation. On the same day I made an-

other translation, and the paper you now hand me is

that translation of the other paper handed me by

Captain Head.

Mr. PRESTON.—We offer it in evidence. (Defendants objected to its introduction on the grounds

(Testimony of Jung Kay.)

that it was incompetent, irrelevant and immaterial and the proper foundation not laid: objection was overruled, and defendants duly excepted.)

Mr. PRESTON.—I will read it. (Reading.) “To Yick Fat: Your [46] letter has been received. From Jung Quey.”

Mr. PRESTON.—Q. I show you another paper, heretofore marked for identification as exhibit 4 across the back, on which are numerous black lines, which paper appears to be in Chinese characters. Will you kindly interpret that in English now, that reporter may get contents. (Objected to by defendants as incompetent, irrelevant and immaterial, and the proper foundation not laid: Objection was overruled, and the defendants duly excepted.)

Witness reading. “I now send a man to bring goods, 28 cans upon receipt of same pay the bearer \$196.00. Answer immediately and the man bring it back tomorrow. Please come and talk together. From Yee Ock.”

The word You Ock on this paper is the same as I translated as You Ock on the other; it is the same characters.

Cross-examination.

I have no independent *now* of the kind of paper that was used in the other things that I translated.

[Testimony of Yt Yee, for Plaintiff.]

YT YEE (one of the defendants) called as a witness on behalf of the plaintiff, sworn and testified as follows:

I speak English, and am a student, and am now a

(Testimony of Yt Yee.)

student in the Affiliated Colleges, and have been for two years, and for one year before that I was attending the College of Physicians and Surgeons. I was pursuing a course in dentistry, and this is my last year, and I have been married a little over a year. I did not know Li Cheung or Yick Fat until after I was arrested. I never talked to either of them until after I was arrested. I never had any business dealing with the defendant Jung Quey. I know the defendant Mon Hing. On the evening of January 31st of this year I went out towards the [47] Potrero Police Station with Mon Hing. We started from town about half-past seven. I did not know where that police station was at that time. I know now that it is out near 20th and Kentucky Streets. I was told we left the car on 20th and Kentucky Streets. Just as Mong Hing and I got off the car there to look around a little, we saw a man dressed in a uniform approaching us from across the street, and he invited us to have a drink at a neighboring saloon. The man I met that night in uniform is the quartermaster Matthai who has been a witness at this trial. By uniform I mean a steamship uniform. I had never met him before, and never had any understanding to go out there and met him that night. I was told that the saloon was the one in the Olympia Hotel, and that is about a block below where we got off the car. After we had the drink Matthai said, "Come upstairs and I will show you fellows something." And Mon Hing and I followed him up to a room. I stood at the doorway. I saw the quarter-

(Testimony of Yt Yee.)

master pull a suitcase from under the bed and I saw him open it. I did not know what was in the suitcase, it was quite a distance from me, and the quartermaster said "Did you bring the money," and Mon Hing said no, and then he turned around and asked him what money. That was about that happened in the room there that I recollect, and after that we turned around to go out. I went out first, and the quartermaster escorted us to the head of the stairs. I went downstairs with Mon Hing, and just as I got to the foot of the stairs I went into the toilet between the foot of the stairs and the bar and Mon Hing went out, and I told him to wait for me outside and I went into the toilet. Afterwards I met him on Kentucky Street. When I met him we were looking for the place where we were going to. That night we were supposed [48] to visit a friend. I never received or took any suitcase from the quartermaster Matthai at any time or place. I was arrested that night. Mon Hing and I were walking down Kentucky Street towards town. We had been waiting for a car, and the cars did not seem to stop; and we missed several cars until we got down to the curve of the railroad track. We stood there for a few minutes waiting for a car, and it was not more than two or three minutes, when I heard a voice behind me, and a man pointed the muzzle of a gun at my belly, and said "Hold up your hands." Of course I held up my hands pretty quick. I took no chances. I threw up my hands. We were not sitting on a bench there, but

(Testimony of Yt Yee.)

were both standing, and Mon Hing threw up his hands too. Right after the man told us to throw up our hands, he felt around me with the other hand; all this time, he pointed the muzzle of the gun at me, and he also searched Mon Hing, and then he ordered us to walk up the track. I did not have any skins, and he did not find any skins on me. I was too scared to notice anything he did. He had a pistol pointed right close to me. He followed behind us all the way to the Potrero Police Station where he made us walk. I did not know he was an officer at that time, and did not know his name, but now know that his name is Olivier. I made several attempts to find out who he was. I said, "If you are going to rob us, go ahead and take our money, and don't keep marching us with our hands up." He said, "Go ahead, don't make a move, or I will kill you." We went ahead, until a block from the station I asked him again who he was. I says, "If you want our money, go take it." He says, "Oh, if you are not satisfied," and he threw back the flap of his coat, and at the top of his suspenders I saw some kind of a badge. I don't know what it was. It was quite dark. It was [49] a block or a block and a half from the police station. When we reached the police we were searched again in the presence of four or five officers in the station. When we were walking to the station we walked partly on the sidewalk, and partly in the middle of the street. We were kept at the police station about an hour and a half and then we were taken back by the officers along Kentucky Street. I

(Testimony of Yt Yee.)

found out later that Captain Head, Inspectors Inlow, Harrison and Olivier were among those who took us back along Kentucky Street. They took us to where we had been arrested, and they left us with Inspector Harrison, and the others went and searched all around the vicinity; and then they took me to my room, and searched my room. I never at any time or place agreed with Yick Fat, Li Cheung, or Jung Quey, or Mon Hing, to assist in receiving, or concealing, or receiving and concealing any opium prepared for smoking purposes. After we were arrested Mr. Wardell questioned us in his private room separately and I made a statement to him as I have testified here. I never gave any money to Matthai and did not see Mon Hing give him any money.

Q. For what purposes were you going out towards the Potrero that night with Mon Hing? A. There was a friend of mine who had been East *studying* aviation, and he just got back a day or two before and he was my former roommate. I thought I would like to go out and see him; not knowing the place, or where to go to to find the place, I asked Mon Hing to go along. I met him in Chinatown, and told him about this, and that is the way I came to be on that car going out there.

Cross-examination.

I am an American-born Chinese; 20 years old; born in Sacramento; and have lived in San Francisco since I was ten years old. My wife lives in Stockton, and I live here at 883 [50] Sacramento Street; it is a

(Testimony of Yt Yee.)

Chinese student's club. I know a man named S. Chang; he is a friend of mine who belongs to the Club, and I have been told that he is a son of Sam Kee. I have known Sam Kee as Jung Quey. I learned that Chang was a son of his after my arrest. I did not know Jung Quey until after my arrest. Mon Hing lives at the same Club with me, and did in January of this year; he had been living there quite a while since he came back from the North about a year ago. I am going to school, and am dependent upon relatives to support me and my wife. The friend's name that I was going to see that evening is Lim. I did not see him that night, nor for some time after as I think he went away. I think he is in town now. I told him that I was looking for him that night afterwards when I met him. He lived out in the Potrero near Butchertown; I don't know the number. I never had been out there, and that is why I asked Mon Hing. I did not know then what street or number it was, but that he lived there where there was a poultry ranch. We took the car at Clay and Kearney Streets to go out Kentucky Street. I did not meet Matthai after I left his room in the hotel at any time or place that evening. The Lim that I was going to see that evening lives with his father and family there, and I do not know any other Chinese family in that section that lives there.

[Testimony of Louis Henry Grau, for Defendants.]

LOUIS HENRY GRAU, called as a witness on behalf of defendants, sworn and testified as follows:

I am a teacher; I conduct the Lyceum, a private

(Testimony of Louis Henry Grau.)

school in San Francisco, which is now located at 376 Sutter Street. I know a number of Chinese in San Francisco, and I have fifty or sixty that attend my school; and I have conducted this school since 1894. [51] I have known the defendant Mon Hing eight years. I know his general reputation in this community for truth, honesty and integrity, and have never heard anything against him; and such reputation is good. He attended the school in 1906, about July.

Cross-examination.

I run a preparatory school for the university. Mon Hing attended school for about two years, and he went to the Oregon College of Agriculture in Conalis in 1909. I don't know what he has done since then. From time to time he has come to see me. I saw him last Friday, and about two months before that. I never heard of his being mixed up in any opium scheme.

[Testimony of C. M. Landers, for Defendants.]

C. M. LANDERS, called on behalf of defendants, and sworn and testified as follows:

I have held the position of purser on the steamer "China," running between here and China, and was purser on that steamer on a voyage from China to San Francisco on her arrival here January 28th, 1914; and as purser I had charge of paying the crew. I knew a man on the steamer on that trip named Ah Fat, who was the quartermaster's boy; he is a mess-boy, they call him, and assigned to the quartermasters Matthia and Kierchisen. He deserted the

(Testimony of C. M. Landers.)

steamer at Nagasaki; I do not remember the exact day. I remember paying the quartermasters off on that trip. And Ah Fat left with us with the steamer on the return trip, and did not come back on the steamer here again. He left the steamer on that trip at Nagasaki. I know Li Cheung who is the storekeeper's boy, and he is not connected with the quartermasters at all.

[Testimony of A. V. Kirchisen, for Plaintiff.]

A. V. KIRCHISEN, was called as a witness on behalf of plaintiff and sworn and testified as follows:
[52]

I was quartermaster on the steamer "China" in January of this year, and had been on her 18 months. I knew Li Cheung, the storekeeper, and he was on board the "China" in January of this year. His work called him to the fore part of the vessel where the ship's stores are, down below the main deck. I had a conversation with him about opium in October and November, 1913. Q. Where was it? (Objected to by defendants upon the ground that it is incompetent, irrelevant and immaterial, and prior to any date alleged here, and prior to the importation of any opium as to the conspiracy which is charged. Objection was overruled, and defendants duly excepted.) A. In the storekeeper's room, here in San Francisco, on the trip before. (Mr. Cook. The same objection goes to all this line of testimony, which is objected to under the ruling of the Court.) Q. Well, the trip on which she came in in January, did you have any conversation with him about opium before you came to

(Testimony of A. V. Kirchisen.)

San Francisco? A. Yes, sir, between Yokohama and Honolulu. Q. Had you or not made known to the custom's officers any fact in connection with Li Cheung before you arrived on this last trip? (Defendants objected to the question upon the ground that it was hearsay; the objection was overruled and defendants duly excepted.) A. Yes, sir. Q. About how many conversations did you have, if you had more than one on the trip from Hong Kong to San Francisco? A. About half a dozen times. Q. What was the tenor or substance of these conversations? (Mr. Cook. The same objection.) A. Taking opium ashore for him. He told me he had plenty of opium on board.

When we got into port I had further conversation with him about it. I furnished the paper to him for him to write a letter upon, and he gave me a paper about the day after we came in, and I communicated with inspector Harrison about it, and I took it up [53] to Grant Avenue. It was in Chinese. The Chinaman there gave me a piece of paper to take back to the storekeeper's boy, which I did. The place where I took the paper was Wong Yung Co., at 814 Grant Avenue.

Also when my partner was in the room and the storekeeper's boy was in the room, the suitcase here and the opium was in the room, packed up in the suitcase. The suitcase was mine. Li Cheung was in the room when I came in, and Matthai was also there. The opium in the suitcase was in seven skins in the shape of sausage and I saw the suitcase and the opium

(Testimony of A. V. Kirchisen.)

leave the ship, and *when* along with it. I was taken first to the Southern Pacific Depot at 3d and Townsend Street, and I have not seen it since until coming into court, and do not know what happened to the suitcase and contents after that time.

Cross-examination.

I saw Ah Fat, our mess-boy on the deck within 25 or 30 feet of our room on the afternoon that I saw this suitcase, and skins in the room, and he had a sack in his hand. That was a short time before I saw Li Cheung in the room, within a minute or a minute and a half. I did not see who brought that opium into Matthai's room, and could not say how it got there or where it came from. I had an understanding with Matthai, my partner, that I was going to get half of the money that he received. I could not say whether I told the customs officers that or not. As soon as I got the money I spent it. I don't expect to do anything for nothing. The first I knew of Matthai was in January, 1913, I never knew him before that: I never knew him in the old country; I did not suggest to him that he get a job on the steamer, he came down to the steamer and asked me for a job. When I went to 814 Grant Avenue I got a slip of [54] paper but I don't remember if I showed it to the Customs Officer or not. I went up to 814 Grant Avenue the trip before. I only brought a note back one time. On January 28th of this year.

[Testimony of D. F. Belden, for Defendants.]

D. F. BELDEN, called as a witness on behalf of defendants, sworn and testified as follows:

My business is real estate here in San Francisco, and has been ten or twelve years, under the firm name of Strong, Belden & Barr. I know the defendant Jung Quey, and have known over a period of from six to seven years, and have known him in San Francisco during that time. I know his general reputation in his community of truth, honesty and integrity, and it is good.

Cross-examination.

Jung Quey business is that of merchant, and his place of business is on Dupont Street I believe, and I would say probably I know half a dozen white persons that know him and one Chinese. The white people live in Nevada, and some in Oakland. I know *is* general reputation in San Francisco because it followed him from the place he originally came from, which as I understand it was Nevada. Q. I will ask you right now if it is not a part of his general reputation that he is in the opium business. A. Not to my knowledge. Q. I will ask you if it is not a fact that he was in the opium business in Nevada? (Mr. Cook. Objected to and I assign it as a prejudicial error on the part of the District Attorney.) A. I never heard of it, I never heard of his connections with opium at all. Q. Is it not a part of his reputation that opium has been found in his room time and time again? (Mr. Cook. The same objection.) [55] A. Never.

(Testimony of D. F. Belden.)

Q. Is it not a part of his general reputation that he has sent for customs inspectors and other people, and tried to enter into unlawful combination with them for the purpose of getting opium? A. I never heard of it. I have known of his reputation from his associations from his connections with my father-in-law in Nevada, in the railroad business furnishing contract labor. My father is general superintendent of the Southern Pacific Railroad and I believe Jung Quey furnishes Chinese labor to the railroad. I never heard anything against his reputation.

[Testimony of Charles W. Brown, for Plaintiff.]

CHARLES W. BROWN, called as a witness on behalf of plaintiff, and sworn and testified as follows:

I am a police officer in San Francisco, and was such in January of this year. I remember on the night of January 31st, two Chinese having been arrested near the Potrero Police Station; there were brought there to the station at 20th and Kentucky Streets by Custom Inspector Olivier. After that time I made a search for opium with Inspector Olivier and we found five skins. We started to search when we left the station at 20th and Kentucky Streets and after we passed 16th Street we walked down Kentucky Street on the east side of Kentucky, and after we passed 16 Street right alongside of the viaduct we found three or four clothes lying near the edge of the curve, Olivier took the cloths up and they were stained with a black stain, and smelt of opium and we continued down as far as 4th Street, and we turned up 4th Street from Kentucky up towards the

(Testimony of Charles W. Brown.)

bridge, and there was a wooden seat or stand between two poles on the North side of 4th Street just after turning from Kentucky Street which is used as a seat for passengers, and there were three skins of opium on this stand or seat. We had [56] another officer with us who had charge of the electric light; it was quite dark in the vicinity and we were using this light, and we worked our way back. Inspector Olivier took charge of the three large skins and we were walking and searching in the vicinity, and in the middle of the car-track on Kentucky Street, near Fourth Street we found two more skins, I should say about 75 or 100 feet from where we found the three skins; it was right in the center of the East car-track: We then continued on and searched, and alongside of a board fence on the East side of Kentucky Street we found a brown suitcase, about three or four hundred feet from where we found the two skins in the center of the car-track. We first found the rags, and then the three skins and then coming back we found two skins, and then the suitcase. The suitcase you now show me is the same one, and I am positive the rags are the same, and the five skins which you now show me were similar to the five skins of opium which we found, except that they were more puffed out when we found them, and the Customs House officers took charge of them at the Potrero Station.

Cross-examination.

I have been a police officer over at the Potrero Station for some time, and am quite familiar with

(Testimony of Charles W. Brown.)

the different points along Kentucky Street between 4th and 20th, and also beyond that on Kentucky Street out toward Butchertown. If you keep going along Kentucky Street you come to Butchertown. Mon Hing was one of the men that was brought into the Station that night. I had seen him before out toward Butchertown, and I know Lim who lives out towards Butchertown, and I have seen them together. Lim's family live about five blocks from the Potrero Station, out along Kentucky beyond the Potrero Station, where the Chinese ranch is. I know Lim, the Chinese Aviator who went East, and that is the [57] one who lives at that Chinese ranch. The distance from 20th and Kentucky to where we found the three skins, is pretty close a mile. The distance from 20th and Kentucky down to Mariposa Street, where the viaduct begins would be a little over a third of a mile. When we started the search we expected to find all the stuff where we found the rags, but Mr. Olivier did not direct us to any place to find the suitcase, but we found it on a general search on the way back. The three skins we found were on the board between the two post and were not lying on the ground underneath. That board between the two posts is a resting place for people to sit down to wait for the car. The seat I should judge was more than a foot long, and about ten or 12 inches wide, and the three skins were lying lengthwise on the seat. They were laid parallel with the sides of the seat, and side by side. I should say that the two skins that were subsequently found in the

(Testimony of Charles W. Brown.)

center, between the car-track, and the street, were found at a distance of about 200 or 300 feet from where the skins were found. I should judge that the fence near which we found the suitcase was about 500 feet from where we found the three skins. It was between half past eight and nine o'clock when the defendants Mon Hing and Yt Yee were first brought into the Potrero Police Station, and a search was made of them then and nothing like these skins found on them.

Redirect Examination.

The Chinese farm, or duck ranch, belonging to Lim, about which I testified, is on Minnesota Street between 23d and 24th Streets, that is about six blocks from the Olympia Hotel.

Recross-examination.

The Olympia Hotel is on 20th and Illinois Streets, then the next parallel with Illinois Street is Kentucky Street, and then Tennessee Street and then Minnesota Street. In order to [58] get to 23d and Minnesota Street you would go along Kentucky Street to 23d, and then turn two blocks west to Minnesota Street. The Kentucky street-car would be the nearest car-line and most direct route that you could take from Chinatown to get there.

[Testimony of Thomas R. Harrison, for Plaintiff.]

THOMAS R. HARRISON, called as a witness for plaintiff, and sworn and testified as follows:

I am an Inspector of Customs and was such in January and February 1914, and at that time was

(Testimony of Thomas R. Harrison.)

stationed at the Port of San Francisco, and the Pacific Mail Dock are on pier 42 and 44 in San Francisco, and the Olympia Hotel, and 4th and Kentucky Streets are in San Francisco, and all of said places are in the Northern District of California.

Q. Have you ever had any talk with either of these quartermasters, Matthia or Kirchisen prior to the incoming of the steamer "China" in January of this year? (Defendants objected to the question as incompetent, irrelevant and immaterial and that any conversation that this man may have had with the quartermasters on any trip previous would be hearsay: Objection overruled and defendants duly excepted.) A. Yes, sir. The first information I had was on the trip previous, the trip the opium was landed; that is previous to January 26th of this year. I saw some opium that was taken off the "China" on the 29th of January, or supposed to be taken off that day. I saw it first at the corner of 3d and Townsend Streets. I saw the grip that the opium was supposed to be contained in when it left the ship, that is when it came over the gangway. Matthai was the man who had the grip. I did not see it opened until it was at 3d and Townsend Street, and it had seven skins of opium in it. [59]

Q. What kind of opium was it? (Objected to by defendants upon the ground that it was incompetent, irrelevant and immaterial and the proper foundation has not been laid: The objection was overruled, and the defendants duly excepted.) A. It was prepared smoking opium. I have had a great deal to do with

(Testimony of Thomas R. Harrison.)

the opium room, and was in the opium room for nine years; that is where all the opium was seized, all the duty paid opium came in to be stamped. That was before this present law was passed.

From 3d and Townsend Street we took the suitcase and contents to the Olympia Hotel at 20th and Illinois Street, and I had charge of it until I turned it over to the property that night. The next day I again took it to the Olympia Hotel, and at that time seven skins were in it. After the arrest the five skins that were recovered were put back in the suitcase which was in my possession until the following day when I turned it over to the seizure clerk in the Appraiser's Building, and I brought it up to court, and the suitcase which you show me is the same suitcase, and the rags and other things that are in it now appear to be the same things, including the skins. At the Olympia Hotel on the evening of January 31st I was concealed in a closet in Matthai's room in the Olympia Hotel. I then heard a portion of a conversation between Matthai and some parties in the room. I heard someone say "have you the money" and the reply I heard was "yes." And the next part of the conversation was "well, here is the opium. Do you wish to see it." That is as much as I could hear of the conversation. I did not see any of the persons, and should judge they were about ten feet from me, and any other conversation was too low for me to hear. After that I went out on the street, and saw Mon Hing there as he was crossing [60] 20th Street to the south side going west toward Kentucky,

(Testimony of Thomas R. Harrison.)

and I saw Matthai on the street, and at that time he had a suitcase. I did not see him take any suitcase out of the room. I had preceded him out of the room. At that time he was going west up 20th Street, but Mon Hing was on the opposite side of the street.

Cross-examination.

I could not say that any Chinese people were in the room, and I could not say it was Matthai who was in the room. I did not hear any one say "you will have to take it down into the street, I cannot take it here." The last time I saw the suitcase there was seven skins in it, and that was before I went into the closet, and when I came out of the closet I did not look to see whether Matthai had the suitcase or not. He was not with me when I went downstairs. I saw a Chinaman come out of a saloon at 20th and Kentucky Street, and searched him, and Mon Hing was on the corner, but I did not search him. That was the last I saw of Matthai that night.

Q. What did you search this Chinaman for that came out of the saloon at 20th and Kentucky Street? (Objected to by the prosecution as immaterial. Objection sustained.) Q. In what direction did that Chinaman go? (Objected to by the prosecution for the same reason. Objection sustained, and defendants duly excepted.) Q. Is it not a fact that you thought this Chinaman had some of the opium? (Objected to by the prosecution for the same reason. Objection sustained and defendants duly excepted.)

The last time I saw Matthai he was on 20th Street

(Testimony of Thomas R. Harrison.)

about ten feet from the hotel going toward Kentucky. I did not see Yt Yee around there at all. I did not go into the toilet, and did not know whether he was there or not. I waited around there [61] about twenty minutes and did not see any other Chinese or Olivier so then I went back and reported to Mr. Head. I went back in the car that went along Kentucky Street toward 4th. I should judge in the neighborhood of ten o'clock I had a telephone message that Olivier was at the Potrero Police Station, and had two Chinaman arrested out there, and then I went out there. I reached the assembly room where I met Captain Head about nine o'clock that evening, and it took me about 10 or 12 minutes to get down there on the car from 20th and Kentucky Street.

[Testimony of Yick Fat, for Defendants.]

YICK FAT, was called as a witness on behalf of defendants, and sworn and testified as follows:

I was one of the crew on the steamer "China" when she came here on January 28th of this year, and I am the Yick Fat that was acquitted by the jury of the charge set forth in the indictment in this case. I was the doctor's boy on the steamer. I know the quartermaster Matthai. I also knew Ah Fat, who was the quartermaster's boy. I saw Ah Fat on the deck of the "China" after she came in go into the quartermaster's room. He went to the messroom; get something, open something, and get some opium sausage, and go to quartermaster's room. Li Cheung was not with him, and did not take anything into the quartermaster's room. I remember the day the

(Testimony of Yick Fat.)

steamer was going to sail to China, and I remember the time that Li Cheung and myself were going to be taken ashore from the vessel. At that time I saw Matthai on the deck, and I also saw Ah Fat there, and I heard Matthai speak to Ah Fat.

Q. What did he say? A. Quartermaster pass along and speak to Ah Fat, Chuck Fat, that is Chuck Fat and Ah Fat are the same, and he was quartermaster's boy. He say, "Ah Fat, when you come to [62] China, you leave ship, don't come back; trouble over the stuff."

Q. He told him when he got to China to leave the ship? A. Yes, he say, "Don't come back, trouble over the stuff; keep still."

Q. Do you remember quartermaster's giving you any piece of paper, a letter? A. Yes, sir, he give me paper; I give him back, give Ah Fat back; don't belong to me. Q. You never gave it to Li Cheung? A. No, sir.

Cross-examination.

I testified as a witness upon the trial when I was acquitted.

Q. Did you say at that time that you ever saw this opium? (Objected to by defendants upon the ground that it was incompetent, irrelevant and immaterial and the question might not have been asked him. Objection overruled.) A. Yes, sir. I see Ah Fat.

Q. Didn't you swear at the last trial you did not see this opium, and did not know anything about it, and never saw anybody with opium? A. Yes, sir. I say first time I see Chuck Fat.

(Testimony of Yick Fat.)

Q. Didn't you swear at the last trial you did not know anything about opium, never heard of it, and never saw any opium? (Defendants made the same objection as to previous question. Objection overruled and defendants duly excepted.) A. Chuck Fat speak to me opium sausage.

Q. Why didn't you tell that at the last trial? Mr. Cook. Objected to as being incompetent, irrelevant and immaterial; he was not asked the question.

A. He *rose* it up together Chuck Fat speak to me opium sausage take it to quartermaster.

Q. Why didn't you swear about these sausages at the last trial? (Objected to by defendants upon the ground that it was [63] incompetent, irrelevant and immaterial, and it has not been shown that he was asked anything about it, or that there was any such question asked, and I assign the statement of the District Attorney as prejudicial error. He will not find anything in the record like that. Objection overruled.) A. It was rolled up, this crossed over that. Chuck speak to me. I saw Chuck Fat. Him opium sausages, he speak to me.

Nobody told me to tell about seeing Ah Fat with the sausages. Last time you asked me you see this man; I say I did not see him. Chuck Fat roll it up all together he crossed on the outside; I could not see inside. He speak to me.

I saw the mess-boy take something to quartermaster's room. He took some cloth and wrapped up some things and he said it was opium and for me not

(Testimony of Yick Fat.)

to speak out. I saw the cloth, but not the opium, and he said it was opium. He was in a hurry. I did not see what he wrapped up. He told me that he was in a hurry.

Q. Did you ever see opium fixed up like that before? (The District Attorney showing the witness some of the bladders or skins in the suitcase.) A. No, sir, I have never seen any put up in sausages like that. I spoke about sausages because the boy told me that they were in opium sausages. I never saw opium sausages. All I know is what he told me.

Q. Why didn't you tell us about having seen this boy with this package at the last trial when you testified. (Objected to by defendants as being incompetent, irrelevant and immaterial and not cross-examination. Objection was overruled, and defendants duly excepted.) A. You never asked me.

Q. I will ask you if this question was not asked you, and if you did not give this answer, by your own counsel. Talking [64] about the talk with the quartermaster.

"Mr. COOK. Q. How long after that was it on that day that you and Li Cheung were arrested? A. The same day she started off. Q. She sailed at one o'clock, didn't she? A. She sailed at 1 o'clock. Between half-past eleven and twelve I was arrested. Q. That was the first you knew of anything about this opium smuggling charge that you were arrested for? A. I did not know anything before that; and when he arrested me I did not know what it was for."

(Testimony of Yick Fat.)

Did you give these answers to these *question* at the last trial?

Mr. COOK.—I submit that is not contrary to anything this witness has testified to, and I object to it as being incompetent, irrelevant and immaterial, and not proper cross-examination. The Court. The objection is overruled. Mr. Cook. Exception.

Mr. PRESTON.—Q. He can read English; let him read it. He said he could. Can't you read English? Didn't you swear at the last trial that you could read English? A. A little bit.

The INTERPRETER.—To question 1 he answers yes. She sailed at one o'clock, didn't she? Yes, his answer is. Yes, I was arrested between 11 and 12. I so answered as stated.

Mr. PRESTON.—Q. Why didn't you tell us that this mess-boy had been carrying opium towards the quartermaster's room at the last trial?

Mr. COOK.—Objection to on the ground that it is incompetent, irrelevant and immaterial, and not proper cross-examination, and it affirmatively appears by the questions propounded that there was no such question asked. Objection was overruled, and defendants duly excepted.

A. When did you ask me? You did not ask me and therefore I did not answer. [65]

Q. Did you see Chuck Fat with a letter at all? A. Yes, sir, he gave it to me and I didn't *not* receive it. I did not take possssssion of it. Q. What did you do with it? A. I gave it back to him.

Q. I will ask you if I did not ask you the following

(Testimony of Yick Fat.)

questions and you gave the following answers at the last trial?

“Q. Did you get a letter from Sam Kee? A. No, sir. Q. Sam Kee did not write you a letter? A. No, sir. Q. Did anybody give you a letter? A. No, sir. Q. Did you ever see a letter Sam Kee signed? A. No, sir. Q. Did mess boy give you a letter? A. No, sir. Q. Never gave you a letter? A. No, sir, never gave me a letter. Q. All you know about this is you heard this man say look out for the stuff. A. I did not know.”

(Mr. COOK.—Objected to as not being contrary to any evidence.) A. I don't remember.

Mr. PRESTON.—We offer it in evidence.

Mr. COOK.—Objected to as not being contrary to any evidence. I think he is bound by it. The objection was overruled and the defendants duly excepted, and that part of the record that was read was admitted in evidence.

[Testimony of Mon Hing, for Defendants.]

MON HING, was called as witness on behalf of defendants, and sworn and testified as follows:

The first time I met Matthai was Friday, January 30th on Grant Avenue and Clay Streets. I left the National Drug Company at Stockton and Grant Avenue with a number of friends and walked from there up towards Sacramento Street, and I saw Sam Kee and Matthai standing on the corner. Sam Kee saw me and called me to come over to him. He told me to ask Matthai what he says. I asked the quartermaster in English, who spoke to me in English. Sam

(Testimony of Mon Hing.)

Kee spoke to me in Chinese. He asked me in [66] Chinese to ask what the quartermaster wanted. I asked the quartermaster what was wanted and he said he would let Sam Kee know by half-past 3 or 4 that afternoon. He did not say what he would let him know. Sam Kee did not *tak* in English to the quartermaster while I was there. He told me to interpret for him in Chinese. That was the substance of all the conversation that took place at that time between me and him. Two or three friends of mine were with me, they were Chinese. Yt Yee was, not there at that time. I was just asked to interpret, and that happens lots of times in Chinatown. I never got any telephone message or talk from the quartermaster or from Sam Kee about any opium at all. I never sent any letters or had any communication with Li Cheung or Yick Fat on the steamer "China" about sending any opium ashore. On January 31st I met Yt Yee about 7 o'clock in the evening at a drug store at Grant Avenue and Jackson Street.

He said he wanted to go down to see Lim; he did not know the place and asked me if I knew, and I told him I did. I knew Lim, he just came back from the east; I knew him a long time; we were boys together. He was an aviator, and Yt Yee asked me if I knew where he lived, and I said I was down there eight or nine years ago, and I said I thought I knew the place now, and I volunteered to take him down. We got on the car at Clay and Kearney Street, and went down to South San Francisco, and left the car

(Testimony of Mon Hing.)

at 20th and Kentucky streets. That was the only lighted street in that part of the city, and I had not been down there for so long I got off there to inquire about it, because we would not meet anybody after that street in that district. As soon as we got off of the car we walked up to the corner drug store and a man in uniform from across [67] the street walked toward us. I knew him when he came up to me, as the same man that I spoke to on Grant Avenue and Clay streets. He came up and shook hands with me and told us to go down and have a drink with him, which we did at the Olympia Hotel. He then asked us to go up to his room, and as soon as we got up to the room he took a suitcase from under the bed, and opened it up and laid it on top of the bed, and asked me if I brought the money, but I have forgotten the exact words he used at the time. I did not have any sum like \$196.00 with me at the time, and I never gave him any money. He never gave me or Yt Yee in my presence the suitcase shown to me in the courtroom here with any skins of opium in it like that; and he never gave either of us any suitcase. I did not see him again that night after I left the room with Yt Yee. When we went out Yt Yee went into the toilet and he asked me to wait outside for him on the street. I waited for him on the corner of 20th and Kentucky streets, on the side opposite the drug store, towards 21st street. I think I waited there ten or fifteen minutes, and after I waited awhile and did not see him I went on the opposite side to look for him, and walked down Kentucky street toward 19th

(Testimony of Mon Hing.)

and I met him on Kentucky Street, and he said after I met him "funny about that fellow asked us for money," etc., and he says he wanted to go home and did not want to go on that trip to Lim's house. He suggested to take a car home from there; seeing there was no cars stopping, and the only place we saw the cars stop was down at that curve where the light was, we walked down toward that place to take the car. While we were waiting for the car a man came up to us, whom we afterwards found to be Officer Olivier, with a gun in his hand, and told us to hold up our hands. He [68] came from behind us. We were standing near two posts where a board is placed, but we were not sitting on the seat. We had not placed anything on that seat at all. We were about 20 feet from that seat and standing right near the car track to take the car. When he told us to hold up our hands we did so. He searched both of us and felt around to see if we had anything on us, but found nothing. He took us back to the police station, and made us walk with our hands up, and we were searched again when we reached the Potrero Police Station.

Cross-examination.

I was born in Chinatown in San Francisco, and am 25 years old. I live at 883 Sacramento Street, and have been living there about a year. Yt Yee has also been living there. I know Sam Kee through his son. I know who he was; I never spoke to him very much except to bow to him when I met him on the street. I work for the Wong Hing Ling Company, 945 Grant

(Testimony of Mon Hing.)

Avenue, and do not work at 742½ Washington Street. I am learning the tailoring trade, and was working there in January of this year. I don't know that Sam Kee can talk English as good as I do, but I do know when I walked up to him he asked me to interpret for him, and to find out what Matthai wanted. After interpreting for him I did not look to see which way Sam Kee went, but I was with another friend of mine and walked away.

I have known Lim about 15 years, and he is an aviator, and I used to go to school with him, and know his father and family, and know that he lived about two blocks from 20th Street, but did not know the name of the street. I have driven around on his one-horse butcher wagon with him.

I did not know what was in the suitcase at the time Matthai showed it to me in his room. He never told me what it was, and I never saw stuff like that before, and I thought [69] it was kind of funny that he asked me about money. I was very much surprised when we were arrested.

[Testimony of James W. Finn, for Defendants.]

JAMES W. FINN, called as a witness on behalf of defendants, sworn and testified as follows:

I am in the wholesale liquor business with the firm of Louis Taussig and Company in San Francisco. I know the defendant Jung Quey as Sam Kee. He has had an account with our firm for over 20 years, and I think I have known him for six or seven years. His business with us was in Nevada, where he was a

(Testimony of James W. Finn.)

storekeeper. He has visited our store occasionally here, and I have heard of his being here in San Francisco for the last year or two, and we have always considered him a good man, and entitled to credit.

Mr. COOK.—Q. You know what the general reputation of a man is, as to whether it is good or bad; you know generally what that means? A. Yes, sir.

Q. You know whether a man has a good reputation in the community? A. Yes, sir.

Q. You have an idea how John Doe or Richard Smith has a good reputation? A. Yes, sir.

Q. You understand what I mean by a man having a good reputation; that is, Mr. Preston objects because you do not know the meaning of that. Do you know the reputation of this man in this community for truth, honesty and integrity?

The COURT.—Answer yes or no. A. No, sir.

Q. What do you know? A. In a business way.

Q. You know his general reputation in a business way?

A. We have had occasion and have had a lot of business dealings with him, so much so that he has the full limit of credit.

Mr. PRESTON.—I move that go out. [70]

The COURT.—Let it go out.

Mr. COOK.—Q. Didn't you make any investigation about him as the credit man of the firm? A. Never had occasion to. Q. You never heard anything against his reputation? A. No, sir.

Mr. PRESTON.—We move that it go out. The

(Testimony of James W. Finn.)

Court. Yes. Mr. Cook. Q. Did you ever hear anything against his reputation? Mr. Preston. The same objection. The Court. The same ruling. Mr. Cook. Exception. I understand that our courts have held that it is the best kind of reputation, never to hear anything against a man.

The COURT.—He says himself he does not know what it is; that ought to end the matter.

Mr. COOK.—Q. Have you ever heard his reputation discussed?

Mr. PRESTON.—Objected to as cross-examination of his own witness. The Court. The objection is sustained. Mr Cook. Exception.

Q. Is Mr. Taussig in the city? A. No, sir, he is in Plumas County at present.

[Testimony of Li Cheung, for Defendants.]

LI CHEUNG, called as a witness on behalf of defendants, sworn and testified as follows:

I was a member of the crew of the steamer "China" arriving about January 28th of this year in San Francisco. I knew a mess-boy of the quartermaster's on that steamer named Chuck Fat. (The witness here requested permission to testify through an interpreter.) I remember that on Thursday or Friday I was working in the storeroom, and the quartermaster's boy Chuck Fat he came down to the storeroom, and he said "Please come up and write a letter for me." I said I did not have time and for him to bring the paper and pencil and I would write for him. He said "All right," [71] and he asked me

(Testimony of Li Cheung.)

to go up to the quartermaster's room and to wait there for him, which I did. He went to the mess-room and came back; he carried one package with him and came into the quartermaster's room with it with me, and at that time the quartermaster Matthai was in the room. And then the quartermaster gave me some paper, and I said to Chuck Fat, "What do you want?" and he said, "I got something to send ashore"; and I said, "What thing?" and he said, "Never mind"; and he said, "I got 28 cans in skins, and one skin to four cans, and I send them ashore; and that a man said he would give \$7.00 apiece for the quartermaster, and altogether there would be 28 pieces, which would come to \$196.00 to give to the quartermaster." He told me what to write in the letter, and I wrote it, and went out and back to the storeroom and to work again. I asked him what name to sign to the letter, and he said, "Never mind the name." It is that letter you show me with black lines ruled on it, which is marked Exhibit 9. This was on Friday. That was all that I had to do with the stuff, nothing more only that letter. I remember before Chuck Fat asked me to write many times letters to friends. He cannot write Chinese. I cannot remember how many times he asked me to write letters. I never brought any stuff or opium into the quartermaster's room. I remember the day Yick Fat and I were arrested; and I remember seeing Chuck Fat standing near where we were on the ship's sailing day, in the morning about 9 or 10 o'clock; and I heard the quartermaster Matthai call "Fat," he

(Testimony of Li Cheung.)

called his boy, Chuck Fat, and I heard him say, "Fat, when you go back to China you leave the ship, you need not come back; there will be trouble about this stuff; you keep still." I heard him say that. I never knew Jung Quey before I was arrested, and never wrote any letter to give to him. And I never sent any opium of any kind to Mon Hing or [72] Yt Yee, and never gave any to Matthai to give to anybody. I never agreed with anyone to try to land any opium from the steamer "China" at San Francisco, and never had anything to do with that kind of thing. I was the storekeeper's boy on the steamer.

Cross-examination.

Twice on another trip I wrote letters for Chuck Fat. I did not know what Chuck Fat brought into the quartermaster's room, but when I wrote the letter for him I suspected it was opium, from the fact that there was so much money to come for it.

Q. Didn't you ever know Sam Kee's manager, the man who manages his store, and on Saturday afternoon didn't he come down to the ship and see you and talk to you about this opium, on Saturday, January 31st? (Defendants object to the question on the ground that it is irrelevant, incompetent and immaterial, and not cross-examination, and assumes it to be a fact that Sam Kee had a manager. Objection overruled.) A. I did not know that man; I did not know Sam Kee's man.

Redirect Examination.

I was a member of the crew, and even after my

arrest had to give a bond to the Immigration authorities to be allowed to stay here and defend this case.

[Testimony of Wong Chung, for Defendants.]

WONG CHUNG, called as a witness on behalf of defendants, and sworn and testified as follows:

On January 30th, 1914, I was working for Wing Hing Lung at 749 Clay Street, San Francisco, and was in that store between 12 and 1 o'clock on that day. I know Jung Tung Quey, the defendant sitting over there, and I also know a man named Jung Quey. I saw the quartermaster Matthai come into the [73] store about that time and Jung Quey was there, but the defendant Jung Tung Quey was not there when he came in. There were several people there. When Matthai came in I spoke to him, and I did not know which man he wanted. He sat down and after awhile the defendant Jung Tung Quey came in, and the quartermaster spoke to him, and the defendant Jung Tung Quey answered "This is not my affair; none of my business." The quartermaster gave him a piece of paper and I saw him look at the paper, and he said, "It did not belong to him," and he did not accept the paper, and then the defendant Jung Tung Quey went out of the store. The quartermaster and the defendant Jung Tung Quey did not at any time go into a room back of the front of the store. The quartermaster stayed about 10 or 15 minutes, after the defendant went out of the store, and the quartermaster asked me to go and look for Jung Tung Quey, and I said I could not find him, and I gave him a card for him to telephone for him. I gave him two cards with

(Testimony of Wong Chung.)

telephone numbers on. The pieces of paper with the telephone numbers on that I gave him was about the size of the paper "Exhibit No. 4," which you now show me. I took the piece of paper from the top of a box on the shelf where they were kept.

Cross-examination.

Wing Hing Lung Company is a big company, and several members in it. Li Tim is the name of the bookkeeper. The name of the manager is Lee Gow; he has gone back to China now; and Li Tim was acting as manager when the quartermaster came in. I don't know whether the defendant Jung Tung Quey has an interest in the company or not. He is back and forth there. He is in the employment business, and leaves the cards there [74] so that if any Japanese, or other persons want to find him, they can do so. I don't know who wrote out the numbers of the telephone on the slips of paper. I saw the defendant constantly putting cards there where I got these cards. I was just working around the store temporarily at the time.

[Testimony of Joseph Head, for Plaintiff (Recalled in Rebuttal).]

JOSEPH HEAD, was recalled in rebuttal for the plaintiff and testified:

I know Sam Kee well, and have talked with him over ten or fifteen times.

Q. Did you ever carry on any extended conversation with him? (Objected to by defendants as incompetent, irrelevant and immaterial, and not proper

(Testimony of Joseph Head.)

rebuttal: Objection was overruled, and defendants duly excepted.) A. Yes he talks fairly well, and an ordinary person would not have any difficulty in understanding him. I know a man said to be the book-keeper of the Wing Hing Lung Co.

[Testimony of Henry Matthai, for Plaintiff (Recalled in Rebuttal).]

HENRY MATTHAI, recalled in rebuttal for plaintiff and testified:

I never had any conversation with Wong Chung, and do not remember seeing him at Wing Hing Lung's store. No one in that store handed me any telephone numbers on any piece of paper, and after the defendant Jung Quey left the store I did not ask anybody there where he had gone. A young man in the store came to me and told me to go to some corner; he talked to me when I came in, but I never heard his name.

I never heard Chuck Fat make any request to Li Cheung to write letters; and I was never present at any conversation with Li Cheung and Chuck Fat about opium or skins. At the time the last letter was written Chuck Fat was not in the [75] room. I never had any talk with Chuck Fat about opium at any time.

A JUROR.—Q. When did you say you first got acquainted with your partner Kirchisen? A. I know him in Germany.

Mr. COOK. Did you know him well there? A. Yes, sir, he says he don't recognize me any more. He was an Ensign in the German Navy I was a Cadet.

(Testimony of Henry Matthai.)

Q. I asked you how long you had known him and didn't you say he had been here about a year, and you were friends in the old Country? A. I did not say I knew him well. I said I knew him.

**[Testimony of Li Cheung, for Defendants
(Recalled).]**

LI CHEUNG, recalled by plaintiff for further examination and testified:

Mr. PRESTON.—Q. Did a Chinaman by the name of Li Tim come down to the Pacific Mail Docks and talk to you at any time while the steamer "China" was in in January. A. I don't know the name. I can't read English. Many Chinaman; my friends come down to see me all the time.

**[Testimony of John Toland, for Plaintiff (in
Rebuttal).]**

JOHN TOLAND, called by plaintiff in rebuttal, and sworn and testified:

I have known the defendant Sam Kee five or six years, and have talked with him a good deal.

Q. What kind of subjects have you discussed with him? (Defendants objected to as incompetent, irrelevant and immaterial, objection overruled.) A. Yes, sir I have discussed subjects with him.

Q. What kind of English can he talk if any? (Objected to by defendants as not rebuttal. Objection overruled and defendants duly excepted.) A. He can: I would say good English; I have had no occasion to have any trouble understanding him.

[76]

The foregoing was in substance and effect all of the testimony and evidence upon the trial, and of all

(Testimony of John Toland.)

the proceedings had thereon.

Upon the conclusion of the aforesaid testimony and evidence the United States Attorney made an opening argument on behalf of the people; and Wm. Hoff Cook Esq., made an argument on behalf of the defendants; and the United States Attorney made the closing argument on behalf of the plaintiff; and thereupon the Court instructed and charged the Jury in the words and figures following:

Charge to the Jury.

The COURT: (Orally.) Gentlemen, the defendants are charged, in the second count of the indictment, as that is the only one on which they are now on trial, with violating section 37 of the Criminal Code of the United States, which provides:

“If two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as therein provided.”

The offense which the defendants are charged with having conspired to commit is that of receiving and concealing certain opium after importation, such opium being opium theretofore imported into the United States contrary to law, as the defendants well knew.

Such conspiracy is alleged to have been formed by Jung Quey, alias Sam Kee, Li Cheung, Yik Fat, Mon Hing and Jt Yee, and others to the Grand Jury unknown. The defendants now on trial are Jung Quey, Li Cheung, Mon Hing and Jt Yee; Yik Fat having

been acquitted by a former jury, you cannot now convict any of these defendants because of any conspiracy with Yik Fat alone, [77] even if you should find such conspiracy to have existed. Nor can you find any of the four defendants on trial guilty because of any conspiracy with any other person or persons, save those on trial here, but in order to convict any of the **four defendants on trial**, you must find that he conspired with some one or more of the other defendants who are now on trial.

The fact that it is charged that Li Cheung and Yik Fat committed certain overt acts is not affected by the acquittal of Yik Fat, if you find that these were committed by Li Cheung and Yik Fat or by Li Cheung alone.

You will observe that the section defining conspiracy requires, before the offense is complete, first, the conspiracy to commit an offense against the United States and second, that one or more of the parties to such conspiracy shall do some act or effect the object thereof. This act is known in law as an overt act.

There are, as I remember, four overt acts charged as having been committed in the offense of this conspiracy, the first of these overt acts being Li Cheung and Yik Fat, on or about the 30th day of January, brought into the port of San Francisco from some foreign port or place unknown, seven skins of opium. The second is that said Li Cheung and Yik Fat prepared seven skins or bladders containing 14 pounds of opium for the purpose of causing the same to be delivered to Jung Quey. The third is that the said

Li Cheung and Yik Fat delivered seven skins or bladders containing 14 pounds of opium for one Mon Hing, for the purpose of having the said opium delivered to the said Jung Quey, alias Sam Kee; and the fourth is that Mon Hing and Jt Yee, on the 31st of January, received the seven skins or bladders containing the 14 pounds of opium, and so forth. [78]

It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of them be proved, and that it was done to effect the object of the conspiracy. To this indictment the defendants have entered a plea of not guilty, thus putting in issue all the material facts embraced therein.

First, you will observe that the indictment herein gives rise to no presumption against the defendants whatever. Such indictment is not evidence or proof in any sense, and must not be considered or treated as such, or acted upon by you as evidence or proof against the defendants.

The defendants and each of them are presumed to be innocent and this presumption has the weight and the effect of evidence in their behalf, and it continues to operate in their favor until it is overcome by competent evidence; and, if the evidence introduced in this case does not overcome this presumption of innocence to your satisfaction, to a moral certainty and beyond all reasonable doubt, you must find the defendants not guilty.

It is not necessary for the defendants to prove their innocence, but the burden rests upon the prosecution to establish every element of the crime with which the defendants are charged, and every ele-

ment of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution fails to establish to a moral certainty and beyond all reasonable doubt any one element of the crime with which the defendants are charged, and which it is necessary to establish, in order to convict, or, if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any element constituting the crime to a moral certainty and beyond all reasonable doubt, then you must find the defendants not guilty.

[79]

The defendants can only be convicted, if at all, on the precise crime set out in the indictment, and although you may be satisfied from the evidence that the defendants have been guilty of other crimes or offenses, nevertheless, they cannot be convicted of the crime set out in the indictment unless the evidence proves to you their guilt of that particular crime. Therefore, unless you find, beyond a reasonable doubt, that a conspiracy existed among one or more of the defendants as alleged in the indictment, you must find all of the defendants not guilty. Mere knowledge of the existence of such conspiracy without active participation therein is not sufficient to warrant the conviction of any defendant. Participation without knowledge, or knowledge without participation is not sufficient to warrant a conviction.

You are the exclusive judges of the weight of the evidence here, and the credibility of the witnesses. Under your oaths as jurors you are to take into consideration only such evidence as has been admitted by

the Court, and you should in obedience to your oaths, disregard and discard from your minds every impression or idea suggested by questions asked by counsel which were objected to, and to which objections were sustained. The defendants are to be tried only on the evidence which is before you, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted. And I caution you to distinguish carefully between the testimony offered here by the witnesses on the stand and statements made by counsel, or maintained in their argument, as to what facts have been proved; and if there is a variance between the two, you must, when arriving at your verdict, consider only the facts testified to by the witnesses and the evidence offered and admitted, [80] together with the instructions of the Court.

The fact that any defendant has not testified in his own behalf should not be considered or construed in any way against him, and you are not at liberty to indulge in any presumption of guilt, or any unfavorable presumption or inference, because he has not testified in his own behalf.

If the evidence leaves it uncertain which, of two or more inferences from the fact proven, is the true inference, you must adduce that inference which is most favorable to the defendants.

Mere probabilities or suspicious are not sufficient to warrant a conviction, nor it is sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chances it is more

probable that the defendants are guilty than innocent.

The defendants are presumed to be men of good character and in this case, have introduced affirmative evidence as to such good character. Good character may in certain cases of itself create a doubt where otherwise none would exist, and this evidence must not be set aside by you to be considered only after you have reached a verdict independently thereof but must be considered by you in connection with all the evidence in the case, and if, after such consideration of all the evidence in the case, including that of good character, you entertain a reasonable doubt of the defendants' guilt, you must return a verdict of not guilty. On the other hand if after a consideration of all the evidence including that of good character you are satisfied of the guilt of the defendant or any of them, you should so find notwithstanding such good character.

I have stated to you that the charge here is that of conspiracy, [81] and a conspiracy may be defined as a confederacy formed by two or more persons to effect an unlawful purpose, said persons acting under a common purpose to accomplish an unlawful end desired.

While a conspiracy cannot exist without a guilty intent being there present in the minds of the conspirators, yet this does not mean that the parties must know that they are violating the statutes, or any statute, of the United States. The only question for you to pass upon in this connection is whether the defendants conspired to do the things which were in violation of law,—not whether they had any knowl-

edge that they were violating the law.

Upon the question of intent on the part of the defendants, you are instructed that the law presumes that every person intends the natural and ordinary consequences of his act. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. Ordinarily the intent with which a man does a criminal act is not proclaimed by him, and ordinarily there is no direct evidence from which the jury may be satisfied, from declarations of the person himself, as to what he intended when he did a certain act. And this question of intent, like all other questions of fact, is solely for the jury to determine from the evidence in the case. Generally, upon this subject of conspiracy, I instruct you that it is competent for you to consider all the facts developed in the case for the purpose of answering the question as to whether or not a conspiracy was in fact entered into between the parties named in the indictment, or any of them.

Direct proof is not indispensable and a conspiracy may be shown by circumstances, but where the prosecution in a criminal [82] case relies upon circumstantial evidence—that is, upon proof of facts and circumstances which are to be used as a means of arriving at the principal facts in question—it is a rule that these facts or circumstances must be fully proven in order to lay the basis for the conclusion which is sought to be established. Each circumstance essential to the conclusion must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance. The burden

of proof throughout is upon the prosecution to prove the guilt of the defendants. In a case depending upon circumstantial evidence alone the rule is, first, that the hypothesis of delinquency or guilt of the offense charged in the indictment must flow naturally from the facts proven and be consistent with them all, and, second, the facts proven must be such as to exclude every reasonable hypothesis or view but that of the guilt of the defendant of the offense imputed to him, or, in other words, the facts proven must all be consistent with the theory of guilt and inconsistent with the theory of innocence.

No defendant can be found by the jury to be a party to a conspiracy without legal and competent proof beyond a reasonable doubt, that he positively came to a mutual understanding with one or more persons to commit an offense, prior to the doing of an overt act in pursuance thereof, and the mere proof that any defendant received or concealed opium prepared for smoking purposes although proof of the commission of a public offense, is not, and would not, of itself, be proof of a conspiracy to receive or conceal such opium; and in this case of a conspiracy, the proof of possession of such opium, would not shift the burden of proof on any defendant to explain such possession. [83]

But while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons by concerted action to accomplish the criminal or unlawful purpose or purposes alleged in the indictment, yet it is not necessary to prove that the parties ever came together and entered into any

formal agreement or arrangement between themselves to effect such purpose or purposes; the combination or common design or object may be regarded as proved if the jury believe from the evidence beyond a reasonable doubt that the defendants were actually pursuing in concert the unlawful object stated in the indictment, whether acting separately or together by common or different means; providing all were leading to the same unlawful result.

It is not necessary, in order to establish the fact of conspiracy, to prove by direct evidence that the parties met and actually agreed to jointly undertake such criminal action. Evidence is indirect as well as direct, indirect consisting of inference and presumptions; and it is the law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed or are logically inferable; and the jury, by *a* exercise of their judgment and reason, based upon a consideration of the usual propensities or passions of men, the course of business or the course of nature, may make such deductions or draw such inferences from the facts proven, if such facts warrant it, as will establish the ultimate fact or facts in issue.

A conspiracy can seldom be proved by direct testimony. Persons combining for the execution of a crime do not ordinarily expose themselves to public observation, and the fact of combination can, therefore, as a general rule, be established only by proof of the acts of the several parties in such combination, [84] the relation of these acts to each other, and their tendency, by united effect, to produce the

common result. In other words, where the jury finds that the acts of the several parties charged with conspiracy are the co-ordinates of each other, and are for the consummation of the criminal purpose charged in the indictment as the object of the conspiracy, showing a common design, they are at liberty to find that the various parties performing these several and respective acts were engaged in a conspiracy to commit the offense, although there may be no direct evidence whatever before the jury to show that such parties ever entered into any agreement to commit such offense.

A conspiracy may be proved by showing the acts and conduct of the conspirators. It is seldom possible to establish a specific understanding by direct agreement between parties to effect or accomplish an unlawful purpose. Usually, therefore, the evidence must necessarily be circumstantial in character and it will be sufficient if it leads to the conviction that such conspiracy in fact existed. Thus, if it be shown that the conspirators were apparently working to the same purpose—that is, one performing one part, and another, another part, each tending to the attainment of the same object so that in the end there was apparent concert of action, whether they were acting in the immediate presence of each other or not, it would afford proof of a conspiracy to effect that object.

It is as competent to prove an alleged conspiracy by circumstantial as by direct evidence. In prosecutions for criminal conspiracy, the proof of the combination charged must almost always be extracted from the circumstances connected with the transac-

tions which form the subject of the accusation. The [85] acts of the parties in the particular case, the nature of those acts, and the character of the transactions, or series of transactions, with the accompanying circumstances, as the evidence may disclose them, should be investigated and considered as the source from which evidence may be derived of the existence or non-existence of an agreement, which may be express or implied, to do an unlawful act. Guilty connection with the conspiracy may be established by showing associations by the persons accused in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design, but each may perform separate acts or hold distinct relations in forwarding that design. There must be an intentional participation in the transaction or transactions with a view to the furtherance of the common design and purpose. If persons work together to achieve an unlawful scheme, having its promotion in view, and actuated by a common purpose of accomplishing the unlawful end, they are conspirators.

When a common purpose to prosecute an unlawful scheme has been shown beyond a reasonable doubt, the overt act or acts or declaration or declarations of any one or all concerned, in furtherance of and while in the execution of such purpose, are admissible as illustrating the design and establishing the character or the original confederation, and after the existence of a conspiracy has been shown, the act or declaration of any one of the conspirators during the continuance thereof and to effect its purposes, is in law

the act or declaration of all.

And, if you believe from the evidence, beyond a reasonable doubt, that any particular one of the defendants was actually pursuing in concert with any other defendant here on trial the unlawful object stated in the indictment, even though he were [86] not a party to the conspiracy at the time when the original conspiracy was formed, if you find that such conspiracy was formed, but that he was aware of the conspiracy when he committed any overt act or acts in pursuance of that unlawful object, and in concert with any of the original parties to the conspiracy, the charge of conspiracy, is established against that defendant, and you must find him guilty.

Where a defendant takes the witness stand, his evidence is to be judged by the same rules which are applied to determining the credibility of any other witness. That is, he is not to be discredited merely upon the ground that he is the defendant. You are to accord him the same fair and impartial consideration of his evidence, when viewed in the light of all the other facts in the case, as you would the testimony of a witness standing in any other relation to the case; but in passing upon the evidence of a defendant you are entitled precisely as with any other witness, to consider the interest he has in the result of the trial, and determine for yourselves how far that interest may have tended to color his evidence or cause him to deviate from the truth.

Witnesses have been called in the course of the trial who have testified about their own participation in the offense. Criticism has been made of their testimony, and the Court instructs you that if these wit-

nesses were acting in conjunction with the officers of the Government and under their direction, and for the sole purpose of securing evidence against the defendants they are not regarded in law as actual accomplices, and their testimony is not subject to the rules applying to the testimony of accomplices. If they were not so acting in conjunction with the officers but were actual guilty participants in the conspiracy charged, if you find such conspiracy to have existed, then I instruct you that it is the settled rule in this country [87] that even accomplices in the commission of crime are competent witnesses, and that the Government has the right to use them as witnesses. It is the duty of the Court to admit their testimony, and that of the jury to consider it. The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care. And the jury should not rely upon unsupported, unless it produces in their minds the most positive conviction of the truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the minds of the jury full and complete conviction of its truth. But where corroborating evidence is required, or is sought by the jury, it is the law that the testimony of one or more accomplices is not sufficient to corroborate the testimony of other accomplices.

The word "accomplices" includes all persons who have been guiltily concerned in the commission of an offense, and the grade and degree of the guilt of such

person is not important, provided there be guilt at all.

While before you can find the defendants guilty of the charge alleged in the indictment, the evidence must satisfy you as to their guilt beyond a reasonable doubt, yet you will not understand from this that the Government is called upon to make a case free from any possible doubt, that is, to prove the defendant's guilt, or the guilt of some of them, to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing with human transactions; in other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence, and not consist of mere fanciful hesitation [88] growing out of your sympathies or based upon something other than a fair and impartial consideration of the evidence in the case.

The term reasonable doubt means just what its language imports. To be a reasonable doubt it must be based upon reason. There is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt. Mere possible or fanciful or imaginary doubts are not reasonable doubt.

A reasonable doubt is that state of the case which, after the entire comparison and examination of all the facts and circumstances, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

Now, the act concerning the importation of opium as far as applies in this case is as follows:

“That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medical purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.”

“Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or” (and this is the portion *which* which you are here most concerned), “shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or [89] sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.”

“Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.”

Section 3: "That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

Now you may, of course, if the evidence warrants it, render a verdict of guilty as to any one or more of the defendants. Because of there being four defendants on trial, you have to find at least two conspired before you can render a verdict of guilty against any of them; or you may render a single verdict as to all of the defendants, or a separate verdict as to each; you may, if the evidence warrants, render a verdict of guilty as to two and not guilty as to the other two.

It requires the concurrence of all of you to agree upon a verdict, and such verdict as you may agree upon, you will have signed by your foreman and return into court. [90]

Upon the conclusion of the evidence and testimony, and prior to the arguments of respective counsel to the jury, certain instructions were requested on behalf of the defendants, in the words and figures follows:

Instructions Requested on Behalf of Defendants.

1.

The second count of the indictment charges that on the 29th day of January, 1914, the five defendants, and other persons whose names are unknown to the Grand Jury, wilfully, corruptly, knowingly and un-

lawfully and feloniously conspired together to knowingly, wilfully and fraudulently receive and conceal seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes, which they all knew had been previously imported into the United States contrary to law, and under this count it is absolutely essential that the conspiracy, as alleged in such count, must be proved, and you must acquit the defendants if the Government fails to establish such conspiracy beyond a reasonable doubt.

2.

I instruct you that you must find beyond all reasonable doubt that a conspiracy, exactly as alleged in the indictment, had been entered into by the defendants and other persons, and before the commission of any alleged overt act in pursuance thereof, before you can consider any evidence as to any overt acts alleged in the indictment, as being done in furtherance of such conspiracy, and to effect and accomplish its object, and in so considering any evidence as to any alleged overt act, the acts of each defendant are only to be considered the individual act of such defendant, and no defendant can be held responsible for any act of any other defendant, or of any other person, unless you can find, by legal and competent evidence, and beyond a reasonable [91] doubt, that such defendant was in fact a party to such an unlawful conspiracy, as is alleged in the indictment, and no allegation of the indictment or proof thereof, of any overt act, can be used to aid the allegations of the indictment as to the alleged conspiracy itself.

3.

I instruct you that this is not a case where these

defendants are charged with the commission of the offense of receiving and concealing smoking opium, so that each defendant who might aid and abet in the commission of such offense would be a principal in the commission of such offense, and thus be bound by the acts of any other person concerned in the commission of such offense, but they are charged solely with a conspiracy to commit an offense, and no person is responsible for the act of any other person unless he himself has first been proven, beyond a reasonable doubt, to be a party to such conspiracy.

4.

You will bear in mind in this case, and under this indictment you must first find by legal and competent evidence, which satisfies the mind of each one of you that two or more of the defendants, unlawfully conspired to commit the offense as alleged in the indictment, and not to commit some other offense, as facilitating the transportation of opium after importation, and that thereafter, and in pursuance of such conspiracy, and to effect and accomplish its purpose and object, that one of such conspiring defendants did some overt act, as alleged in the indictment, and I instruct you that you cannot find any of the defendants guilty unless the evidence establishes the conspiracy itself to have been made by the defendants within the Northern District of California; and I instruct you that San Francisco is in such Northern District. [92]

5.

No person can be found by a jury to be a party to a conspiracy unless there is proof that he positively came to a mutual understanding with another to ac-

comply with a common and unlawful design."

6.

I instruct you that no acts or declarations of an alleged conspirator, subsequent to the completion of such joint criminal enterprise, is admissible, or to be considered by the jury against any other alleged co-conspirator.

7.

I instruct you that a conspiracy to receive opium is completed when it has been delivered to a person after importation.

8.

I instruct you that no defendant can be found by the jury to be a party to a conspiracy without legal and competent proof beyond a reasonable doubt, that he positively came to a mutual understanding with one or more persons to commit an offense, prior to the doing of any overt act in pursuance thereof, and the mere proof that any defendant received or concealed opium prepared for smoking purposes although proof of the commission of a public offense, is not, and would not, of itself, be proof of a conspiracy to receive or conceal such opium; and in this case a conspiracy, the proof of possession of such opium, would not shift the burden of proof on any defendant to explain such possession.

9.

A conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense, as set [93] forth in the indictment; and the corrobora-

tion is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

10.

The word "accomplice" includes all persons who have been concerned in the commission of an offense, and the grade or degree of the guilt of such persons is not important.

11.

An accomplice may also be defined to be a person who knowingly or voluntarily unites in the commission of a crime, or associates in the commission of a crime, or is a partner in the guilt, or of any part of the proceeds of such crime; and the term "accomplice" includes all participants in the commission of crime.

12.

Any person who aids and abets another in the commission of a crime or advises and encourages its commission is an accomplice of such other person; and I instruct you that if you find that any witness was to or did receive any money by reason of assisting in any alleged overt act, that such person is an accomplice, and you cannot convict upon his uncorroborated testimony, and the testimony of any accomplice is not legal corroboration of any other accomplice.

13.

I instruct you that the testimony of an accomplice ought to be viewed with distrust.

14.

A person who unlawfully gives opium prepared for smoking purposes to another person is an accomplice of the person who unlawfully receives such

opium, and any person who aids and abets, or advises and encourages such person unlawfully to give such opium to another person is an accomplice of the person who unlawfully receives [94] such opium.

15.

I instruct you that in this case it is incumbent upon the prosecution to prove every material allegation in the indictment, and the burden of proof does not shift to any defendant to establish his innocence, and when independent facts and circumstances are relied upon to establish the guilt of a defendant, the rule is that the fact or circumstance shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion or otherwise the evidence will be insufficient to convict; and every material dependent fact or circumstance necessary to the complete chain or series of dependent facts or circumstances tending to establish a presumption of guilt, shall be established to the same degree of certainty as the main fact.

16.

I instruct you that if you find from the evidence that the quartermaster Matthai took any opium prepared for smoking purposes from the steamship "China" on January 30th, 1914, while she was in the port of San Francisco, and that he did so with the permission of the Government, through its duly authorized officers, then I instruct you that such opium was not being unlawfully transported after its importation, and the receipt of such opium by any person thereafter, by any person, from said quartermaster, was not an unlawful act, and therefore cannot be considered by you as an unlawful act done in

pursuance of the conspiracy, as alleged in the indictment, and such testimony cannot be considered by you as establishing in any degree the guilt of any of the defendants of the conspiracy as alleged in the indictment. [95]

17.

I instruct you that there can be no conspiracy without the doing of some overt act to effect the object and purpose of such conspiracy.

18.

You are instructed that no matter how strong may be the probability in favor of the hypothesis of guilt, if it is nothing more than a probability, the presumption fails, and the defendant must be acquitted; a suspicion, no matter how strong it may be, cannot justify you in convicting; the law does not permit a conviction of a crime on suspicion, be it ever so strong.

19.

I instruct you that it is not sufficient that the facts proved coincide with, account for, and therefore render probable and hypothesis of guilt asserted by the prosecution; but they must exclude, to a moral certainty, and beyond all reasonable doubt, every other hypothesis but the single one of guilt, or the jury must acquit.

20.

In determining the weight or credit to be given to testimony of any witness you have the right to consider whether such witness is testifying under promise that he will not be prosecuted or punished for admitting crimes, and whether or not such witness is testifying under a promise of immunity, and

whether or not such witness is testifying under a hope that immunity will be granted, or receiving compensation therefor.

21.

A conspiracy has these elements; First, An object to be accomplished, which must be the commission of a public offense against the United States, and not against the laws of any [96] particular State; Second, a plan or scheme embodying means to accomplish the object; Third, an agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme or by effectual means; and Fourth, an overt act by one or more of the conspirators in furtherance of and to effect the object of the conspiracy.

22.

You are instructed that the plea of "not guilty" of the defendants is a denial by them of each and every fact alleged in the indictment, and that it is not necessary for any defendant in order to obtain an acquittal from your hands to either take the witness stand himself, nor produce any evidence to support his denial; each defendant may rest upon that denial, and the presumption of his innocence; and if the evidence produced by the prosecution does not satisfy you of a defendant's guilt, to a moral certainty and beyond a reasonable doubt, it is your duty upon such defendant's plea of not guilty, and the presumption of his innocence, to acquit him.

23.

You are instructed that it is not incumbent upon any defendant to establish his innocence or to endeavor to do so; neither is it the duty of any defendant to explain suspicious circumstances.

24.

Each defendant has a right to remain mute and demand that the Government make the case against him to a moral certainty and beyond a reasonable doubt; and the jury is not at liberty to comment upon the fact, or to consider the fact that a defendant has not testified in the case. Neither are the jurors permitted [97] to draw any inference or presumption or conclusion adverse to a defendant because he has remained mute or has not testified.

25.

Even though you should conclude from the evidence that a defendant is guilty of any number of crimes, still if you are not convinced of such defendant's guilt to a moral certainty and beyond all reasonable doubt from the evidence presented, of the precise offense charged in the indictment, it is your duty to find such defendant not guilty.

26.

You should consider the evidence in this case, and apply it as though each of the defendants were being separately tried, and you are not to indulge in any inference or presumption against any defendant because he is being jointly tried with the other defendants, nor are you to infer or presume that because the Court has directed the defendants to be tried jointly and not to have separate trials that they

are for that reason jointly involved in any matter alleged in this indictment.

WM. HOFF COOK,
Attorney for Defendants.

[Order Settling etc. Bill of Exceptions.]

I hereby certify that the foregoing Bill of Exceptions in substance and effect contains a full statement and transcript of all the proceedings had upon the trial of the above-entitled action, and also that the same, in substance and effect contains a full and complete statement and transcript of all the testimony and evidence had upon said trial; and I hereby certify that the same is correct; and said Bill of Exceptions is hereby settled, approved and allowed.

M. T. DOOLING,
District Judge. [98]

The foregoing Bill of Exceptions is satisfactory to me.

JNO. W. PRESTON,
U. S. Atty.

[Receipt for Copy of Bill of Exceptions.]

RECEIPT of a copy of the within Bill of Exceptions of Proceedings had upon the trial of the cause is hereby admitted this 6th day of August, 1914.

JOHN W. PRESTON,
United States Attorney (W. E. H.)

[Endorsed]: Filed Nov. 6, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [99]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

THE UNITED STATES OF AMERICA,

vs.

JUNG QUEY et al.,

[Verdict on Second Count of Indictment.]

We, the Jury, find JUNG QUEY, LI CHEUNG,
MON HING and JT YEE, the defendants at the bar,
GUILTY on the Second Count of the Indictment
herein.

JOHN G. BARKER,

Foreman.

[Endorsed]: Filed June 12, 1914, at 6 o'clock and
55 minutes P. M. W. B. Maling, Clerk. By C. W.
Calbreath, Deputy Clerk. [100]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

THE UNITED STATES OF AMERICA,

vs.

JUNG QUEY, LI CHEUNG, MON HING, and JT
YEE,

[Verdict on First Count of Indictment.]

We, the Jury, find for the defendants at the bar,

upon their plea of former acquittal of the offense charged in the first count of the indictment.

JOHN G. BARKER,
Foreman.

[Endorsed]: Filed June 12, 1914, at 6 o'clock and 55 minutes P. M. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [101]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

THE UNITED STATES OF AMERICA,

vs.

JUNG QUEY, LI CHEUNG, MON HING and JT
YEE,

Verdict.

We, the Jury, find for each of the defendants at the bar, upon his plea of former acquittal of conspiracy with Yik Fat alone.

JOHN G. BARKER,
Foreman.

[Endorsed]: Filed June 12, 1914, at 6 o'clock and 55 minutes P. M. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk. [102]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

Motion for a New Trial of Defendant Jung Quey.

Now comes the defendant herein JUNG QUEY, and moves the Court for an order setting aside the verdict herein, and granting the defendant a new trial, upon the grounds:

1. That the Court misdirected the jury in matters of law:

2. That the Court erred in the decision of questions of law arising during the course of the trial, and excepted to by defendant:

3. That the verdict is contrary to law:

4. That the verdict is contrary to the evidence:

5. That the evidence is insufficient to sustain the verdict:

6. That the Court erred in admitting in evidence, over the objections of defendant, Government's Exhibits:

7. That the Court erred in refusing to give all of the instructions to the jury, in the form as requested by defendant:

8. That the Court erred in modifying certain instructions requested by defendant.

WM. HOFF COOK,
Attorney for Defendants.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [103]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

Motion for a New Trial of Defendant Li Cheung.

Now comes the defendant herein LI CHEUNG, and moves the Court for an order setting aside the verdict herein, and granting the defendant a new trial, upon the grounds:

1. That the Court misdirected the jury in matters of law:

2. That the Court erred in the decision of questions of law arising during the course of the trial, and excepted to by defendant:

3. That the verdict is contrary to law:

4. That the verdict is contrary to the evidence:

5. That the evidence is insufficient to sustain the verdict:

6. That the Court erred in admitting in evi-

dence, over the objections of defendant, Government's Exhibit:

7. That the Court erred in refusing to give all of the instructions to the jury, in the form as requested by defendant:

8. That the Court erred in modifying certain instructions requested by defendant.

WM. HOFF COOK,
Attorney for Defendants.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [104]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

Motion for a New Trial of Defendant Mon Hing.

Now comes the defendant herein MON HING, and moves the Court for an order setting aside the verdict herein and granting the defendant a new trial, upon the grounds:

1. That the Court misdirected the jury in matters of law:

2. That the Court erred in the decision of questions of law arising during the course of the trial, and excepted to by defendant:

3. That the verdict is contrary to law:
4. That the verdict is contrary to the evidence:
5. That the evidence is insufficient to sustain the verdict:

6. That the Court erred in admitting in evidence, over the objections of defendant, Government's Exhibits:

7. That the Court erred in refusing to give all of the instructions to the jury, in the form as requested by defendant:

8. That the Court erred in modifying certain instructions requested by defendant.

WM. HOFF COOK,
Attorney for Defendants.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [105]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

Motion for a New Trial of Defendant Yt Yee.

Now comes the defendant herein YT YEE, and moves the Court for an order setting aside the verdict herein, and granting the defendant a new trial, upon the grounds:

1. That the Court misdirected the jury in matters of law:

2. That the Court erred in the decision of questions of law arising during the course of the trial, and excepted to by defendant:

3. That the verdict is contrary to law:

4. That the verdict is contrary to the evidence:

5. That the evidence is insufficient to sustain the verdict:

6. That the Court erred in admitting in evidence, over the objections of defendant, Government's Exhibits:

7. That the Court erred in refusing to give all of the instructions to the jury, in the form as requested by defendant:

8. That the Court erred in modifying certain instructions requested by defendant.

WM. HOFF COOK,
Attorney for Defendants.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [106]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

Motion in Arrest of Judgment of Defendant Jung Quey.

Now comes the defendant herein JUNG QUEY, and moves the Court that *in* arrest its judgment upon the verdict of guilt herein, and that no judgment be rendered by the Court upon the verdict of "guilty as charged in the indictment," heretofore found against this defendant and said motion is made upon the grounds:

That the second count of the indictment herein does not state facts sufficient to constitute a public offense against this defendant.

2. That the whole record and evidence in this case fails to establish any violation by the defendant of a conspiracy to violate the Act of Congress of February 9th 1909.

Wm. HOFF COOK,
Attorney for Defendant.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [107]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5441.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

**Motion in Arrest of Judgment of Defendant Li
Cheung.**

Now comes the defendant herein LI CHEUNG, and moves the Court that *in* arrest its judgment upon the verdict of guilt herein, and that no judgment be rendered by the Court upon the verdict of "guilty as charged in the indictment," heretofore found against this defendant and said motion is made upon the grounds:

That the second count of the indictment herein does not state facts sufficient to constitute a public offense against this defendant.

2. That the whole record and evidence in this case fails to establish any violation by the defendant of a conspiracy to violate the Act of Congress of February 9th 1909.

Wm. HOFF COOK,
Attorney for Defendant.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [108]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 5441.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

Motion in Arrest of Judgment of Defendant Mon Hing.

Now comes the defendant herein, MON HING, and moves the court that it arrest its judgment upon the verdict of guilt herein, and that no judgment be rendered by the Court upon the verdict of "guilty as charged in the indictment," heretofore found against this defendant, and said motion is made upon the grounds:

That the second count of the indictment herein does not state facts sufficient to constitute a public offense against this defendant.

2. That the whole record and evidence in this case fails to establish any violation by the defendant of a conspiracy to violate the Act of Congress of February 9th, 1909.

WM. HOFF COOK,
Attorney for Defendant.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [109]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 5441.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

Motion in Arrest of Judgment of Defendant Yt Yee.

Now comes the defendant herein YT YEE and moves the Court that it arrest its judgment upon the verdict of guilt herein, and that no judgment be rendered by the Court upon the verdict of "guilty as charged in the indictment," heretofore found against this defendant, and said motion is made upon the grounds:

That the second count of the indictment herein does not state facts sufficient to constitute a public offense against this defendant.

2. That the whole record and evidence in this case fails to establish any violation by the defendant of a conspiracy to violate the Act of Congress of February 9th, 1909.

WM. HOFF COOK,
Attorney for Defendant.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [110]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the Courtroom Thereof, in the City and County of San Francisco, State of California, on Thursday the 25th day of June, in the year of our Lord One Thousand Nine Hundred and Fourteen. Present: the Honorable M. T. DOOLING, Judge.

No. 5441.

UNITED STATES OF AMERICA,

vs.

JUNG QUEY et al.

Order Overruling Motion for New Trial, etc.

In this case, defendants Jung Quey, Li Cheung, Mon Hing and Jt Yee were present in open court with their attorney, Wm. Hoff Cook, Esq. John W. Preston, Esq., appeared on behalf of the United States, and thereupon, the defendants were called for the pronouncing of judgments upon the verdicts of guilty heretofore rendered herein against them. The Court then asked if they had any legal cause to show why judgment should not be pronounced against them, and in response thereto, Mr. Cook presented and filed, as to each defendant, motion for a new trial, and after hearing counsel for both parties, the Court ordered that said motion be, and the same is hereby, denied. Mr. Cook then presented and filed, as to each defendant, motion in arrest of judgment, which was likewise [111] argued and ordered overruled by the Court, to which rulings of the Court Mr. Cook then and there entered an exception. Thereupon, the Court proceeded to pronounce judgments upon said defendants and ordered that defendant Jung Quey, for the offense of which he stands convicted, be imprisoned for the period of one year, and that he pay a fine in the sum of \$1500, and that in default of the payment thereof, he be further imprisoned until said fine is paid or he is otherwise discharged by due process of law; that Li Cheung, for the offense of which he stands convicted, be imprisoned for the period of eight months; that Mon Hing, for the offense of which he stands convicted, be imprisoned for the period of ten months; and that

defendant Jt Yee, for the offense of which he stands convicted, be imprisoned for the period of six months. Further ordered that said judgments of imprisonment be executed upon said defendants by imprisonment in the County Jail of Alameda County, State of California, and that said defendants be committed to the custody of the United States Marshal for this district for the execution of said judgments and that commitments issue accordingly. Thereupon, on motion of Mr. Cook, the Court ordered that the execution of said judgments be, and the same are hereby, stayed for a period of one day, and that said defendants be permitted to go at large, pending the expiration of said stay, on the bonds heretofore given herein for their appearance. [112]

In the District Court of the United States, for the Northern District of California, First Division.

No. 5441.

THE UNITED STATES OF AMERICA,

vs.

JUNG QUEY, alias SAM KEE, LI CHEUNG,
MON HING, and JT YEE.

**Judgment on Verdict of not Guilty on the First
Count of the Indictment, and Guilty on the
Second Count of the Indictment.**

Convicted of conspiring to receive and conceal opium prepared for smoking purposes, knowing the same to have been imported contrary to law.

Now on this 25th day of June, A. D. 1914, the de-

fendants, in their own proper persons and with their counsel, Wm. Hoff Cook, Esq., being present in open Court, comes John W. Preston, Esq., United States Attorney, and moves the Court that judgment be pronounced in this cause; whereupon the defendants were duly informed by the Court of the nature of the indictment filed on the 6th day of February, A. D. 1914, charging them with the crime of a violation of Section 37, of the Criminal Code of the U. S. and Act of February 9th, 1909, as amended, by the Act of January 17th, 1914; of their arraignment and plea of Not Guilty; of their trials and the verdict of the Jury on the 13th day of April, 1914, to wit: "We, the Jury, find Jung Quey, Li Cheung, Yik Fat, Mon Hing and Jt Yee, the defendants at the bar, Not Guilty on first Count." And the verdicts of the Jury on the 12th day of June, 1914, to wit: "We, the Jury, find Jung Quey, Li Cheung, Mon Hing and Jt Yee, the defendants at the bar Guilty on the second count of the Indictment herein." "We, the Jury, find for each of the defendants at the bar, upon his plea of former acquittal of conspiracy with Yik Fat alone." "We, the Jury, find for the defendants at the bar, upon their plea of former acquittal of the offenses charged in the first count of the Indictment." [113]

The defendants were then asked if they had any legal cause to show why judgment should not be pronounced against them, and no sufficient cause being shown or appearing to the Court, and the Court having denied a Motion for a New Trial, and a Motion in Arrest of Judgment; thereupon the Court rendered its judgment:

THAT WHEREAS, the said Jung Quey, alias Sam Kee, Li Cheung, Mon Hing and Jt. Yee, having been duly convicted in this court of the crime of conspiring to receive and conceal opium prepared for smoking purposes, knowing the same to have been imported contrary to law.

IT IS THEREFORE ORDERED AND ADJUDGED that the said Jung Quey alias Sam Kee be imprisoned in the Alameda County Jail, Alameda County, California, for the term of one year, and that he pay a fine of \$1500, and in default of the payment of said fine that he be further imprisoned until said fine be paid or until he be otherwise discharged by due course of law.

That the defendant Li Cheung be imprisoned in the Alameda County Jail, Alameda County, California, for the term of eight (8) months.

That the defendant Mon Hing be imprisoned in the Alameda County Jail, Alameda County, California, for the term of ten (10) months.

That the defendant Jt Yee be imprisoned in the Alameda County Jail, Alameda County, California, for the term of six (6) months.

JUDGMENT ENTERED this 25th day of June,
A. D. 1914.

WALTER B. MALING,
Clerk,
By C. W. Calbreath,
Deputy Clerk. [114]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 5441.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY, alias SAM KEE, LI CHEUNG,
MON HING and YT YEE,

Defendants.

Petition for Writ of Error and Appeal.

Now come Jung Quey, alias Sam Kee, Li Cheung, Mon Hing and Yt Yee, the defendants in the above-entitled cause, and say that on or about the 12th day of June, 1914, these defendants were found guilty by a verdict of the jury of the offense set forth in the second count of the indictment in this cause and on or about the 19th day of June, 1914, this Court upon said verdict pronounced and rendered judgment against said defendants as follows, viz.: that said defendant Jung Quey, alias Sam Kee be imprisoned in the county jail of Alameda County for the term of one year, and that he pay a fine of \$1500.00; and that said defendant Mon Hing be imprisoned in the county jail of Alameda County for the term of ten months; and that said defendant Li Cheung be imprisoned in the county jail of Alameda County for the term of eight months; and that said defendant Yt Yee be imprisoned in the county jail of Alameda County for the term of six months,

in which said judgments and sentences, and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of said defendants, all of which will more in detail [115] appear from the assignment of errors which is filed with this petition, and which will also appear from an additional assignment of errors to be filed upon the settlement of a bill of exceptions to be subsequently filed herein.

Wherefore said defendants pray that an appeal and writ of error may issue in this behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, together with a true copy of a bill of exceptions to be hereafter settled and allowed, that the same may be reviewed and corrected by said Circuit Court of Appeals:

And your petitioners further pray that such appeal and writ of error prayed for act as a superseedeas, and that the judgments and sentences to be reviewed be not executed pending the determination of said appeal and writ of error, and that the said defendants and petitioners be enlarged on bail pending the determination of said appeal and writ of error.

WM. HOFF COOK,
Attorney for Petitioners.

[Endorsed]: Filed Jul. 7, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [116]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 5441.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY, alias SAM KEE, LI CHEUNG,
MON HING and YT YEE,

Defendants.

Assignments of Error.

The defendants in the above-entitled action, and the plaintiffs in error, having petitioned for an order of the Court permitting them to procure a Writ of Error and Appeal, directed from the United States Circuit Court of Appeals for the Ninth Circuit, to the District Court of the United States for the Northern District of California, from the judgments and sentences made, pronounced and entered in said cause against said defendants, the petitioners herein, and in favor of the plaintiff, now make and file with their petition for such Writ of Error and Appeal, the following specifications as their Assignments of Error herein, upon which they will rely for the reversal of said judgment upon said Writ and Appeal; and they say that in the records and proceedings in the above-entitled cause, upon a hearing and determination thereof in the District Court of the United States for the Northern District of California, First Division, there is manifest error in this, to wit:

First. The Court erred in overruling the demur-

rers of the defendants and petitioners to the Second Count of the indictment in the cause; [117]

Second. The Court erred in overruling the demurrers of said defendants to the second count of said indictment, in determining and deciding that it was not necessary in said indictment to allege a scheme to use certain means for the purpose of effecting the alleged conspiracy;

Third. The Court erred in overruling the demurrers of said defendants to the second count of said indictment, and in holding that said second count of said indictment alleged facts sufficient to constitute a conspiracy to violate a law of the United States.

Fourth. The Court erred in overruling the demurrers of defendants to the second count of said indictment, and in holding that a conspiracy to conceal and receive opium after importation was a public offense.

Fifth. The Court erred in overruling the demurrers of defendants to the second count of said indictment, and in holding that the Act of Congress of February 9, 1909, as amended January 17, 1914, was constitutional in that portion thereof which made it unlawful to receive or conceal opium prepared for smoking purposes after its importation.

Sixth. The Court erred in overruling the demurrers of the defendants to the second count of said indictment, and in holding that said second count stated facts sufficient to constitute a public offense, without alleging any conspiracy to receive or conceal such opium in the District of California after its unlawful importation.

Seventh. The Court erred in the matter of the impaneling of the jury in the following particulars, viz.: that these defendants had previously been tried upon the second count of the indictment herein and the jury upon said trial disagreed, and that upon the impanelment of the jury upon such first trial, that [118] four men after their examination as to their qualification to act as such jurors upon said first trial were excused under peremptory challenges exercised against each of them by these defendants; and that before the second trial of said cause was commenced the defendants requested that the names of said four persons who were thus challenged by the defendants upon said first trial be not placed in the jury-box to be drawn as prospective jurors upon the impanelment of the jury upon such second trial; that the Court overruled the objections of defendants to the placing of said four names in the jury-box and permitted them to be placed therein and said four men were again drawn upon the impanelment of the jury in the second trial, and the defendants were necessarily again compelled to exercise similar peremptory challenges upon three of said men and were obliged to keep one of said men upon such second trial as a juror; and thus in effect the defendants were only allowed the free use and exercise of six peremptory challenges upon said second trial, instead of ten peremptory challenges as are allowed by law;

Eighth. The Court erred in admitting in evidence over the objections of defendants, Government's Exhibit No. 1, which was a paper in Chinese characters which was translated by the Chinese interpreter and

witness Yung Quey, which was testified by the witness Matthai as having been given to him by the defendant Li Cheung; and such exhibit was objected to by defendants as being irrelevant, incompetent and immaterial and no proper foundation having been laid for its admission.

Ninth. The Court erred in admitting in evidence Government's Exhibit 2, over defendants' objections, which exhibit was a purported translation of a paper which the witness Head testified was given to him by the witness Matthai, and which was in Chinese [119]. characters, and which, after the purported translation thereof had been made, the witness Head testified he again gave to the witness Matthai, and which paper the witness Matthai testified that he subsequently gave to the defendant Jung Quey; there was no testimony that such paper was the paper given by Li Cheung to the witness Matthai; and defendants objected to the admission in evidence of such paper upon the grounds that the same was irrelevant, immaterial and incompetent and that no proper foundation had been laid for its admission;

Tenth. The Court erred in admitting in evidence Government's Exhibit No. 3, over defendants' objections, which exhibit was a purported translation of a paper which the witness Matthai testified that he received from the defendant Jung Quey, and which he also testified was subsequently delivered to Yik Fat, and there was no evidence that said paper was ever delivered to the defendant Li Cheung, or to any other defendant; and the witness Matthai testified that he delivered said paper, after he received it from the defendant Jung Quey, too the wit-

ness Head; and the witness Head testified that he had it translated, and that the translation thereof was set forth in Exhibit No. 3, and that after such translation had been made that he delivered the original paper to the witness Matthai, and the witness Matthai testified that he gave it to Ah Fat, and that he told Ah Fat to deliver it to Yik Fat; and defendants objected to the introduction of this exhibit in evidence upon the grounds that the same was irrelevant, immaterial and incompetent, and that no proper foundation had been laid for its admission;

Eleventh. The Court erred in admitting in evidence over defendants' objections, Government's Exhibit No. 9; said exhibit being a receipt from a photographer for \$4.00 for photographs taken [120] of the defendants Mon Hing and Yt Lee at the time of their arrest upon a commissioner's warrant, which exhibit the witness Head testified that he found upon the person of the defendant Jung Quey at the time he arrested him; and said witness Head testified that he had no warrant for the arrest of said Jung Quey at said time and that he was not a Deputy United States Marshal; and a previous demand had been made before the trial upon the District Attorney for the return of all papers and documents taken from the possession of Jung Quey; said objection was upon the ground that said exhibit and evidence was irrelevant, incompetent and immaterial and that no proper foundation had been laid for its admission.

Twelfth. That the Court erred in overruling the objections of defendants to the testimony of the witnesses Matthai and Kircheisen as to conversations

had by them with the defendant Li Cheung in relation to taking opium ashore, at times long prior to the arrival of the steamer "China" in San Francisco about December 28, 1913; said objections were made upon the grounds that such testimony was irrelevant, incompetent and immaterial.

Thirteenth. The Court erred in refusing to give the jury the following instructions requested by the defendants.

"I instruct you that if you find from the evidence that the quartermaster Matthai took any opium prepared for smoking purposes from the Steamship 'China' on January 30th, 1914, while she was in the port of San Francisco, and that he did so with the permission of the Government, through its duly authorized officers, then I instruct you that such opium was not being unlawfully transported after its importation, and the receipt of such opium by any person thereafter, by any person, from said quartermaster, was not an unlawful act, and therefore cannot be considered by [121] you as an unlawful act done in pursuance of the conspiracy, as alleged in the indictment, and such testimony cannot be considered by you as establishing in any degree the guilt of any of the defendants of the conspiracy as alleged in the indictment."

Fourteenth. The Court erred in refusing to give the following instruction requested by defendant:

"A conspiracy has these elements; First, an object to be accomplished, which must be the commission of a public offense against the United States, and not against the laws of any particular State; Second, a plan or scheme embodying means to ac-

comply with the object; Third, an agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme or by effectual means; and Fourth, an overt act by one or more of the conspirators in furtherance of and to effect the object of the conspiracy.”

Fifteenth. The Court erred in holding and deciding that the evidence was sufficient to sustain a conviction of any of the defendants, in this, that the five skins which were testified to by the different witnesses as containing opium prepared for smoking purposes were never offered or admitted in evidence, and therefore all of the evidence in relation thereto was irrelevant, and immaterial and incompetent and insufficient to sustain the proof of any of the overt acts alleged in the second count of the indictment;

Sixteenth. The Court erred in denying the motions of the defendants for new trial herein;

Seventeenth. The Court erred in denying the motions of the defendants in arrest of the several judgments herein.

WM. HOFF COOK,

Attorney for Defendant and Plaintiffs in Error. [122]

[Endorsed]: Filed Jul. 7, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [123]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 5441.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY, Alias SAM KEE, LI CHEUNG,
MON HING and YT YEE,

Defendants.

Additional Assignments of Error.

With the permission of the Court, the plaintiffs in error, herewith present and file the following additional assignments of error, upon the appeal heretofore allowed herein, and they specify the following as additional errors upon which they will reply for the reversal of said judgment upon the Writ of Error and appeal herein; and they say that in the records and proceedings, in the above-entitled cause, upon a hearing and determination thereof in the District Court of the United States, for the Northern District of California, First Division, there is manifest error in this, to wit:

First. The Court erred in overruling the objections of defendants to the following questions asked of the witness L. L. Pokorney, viz.:

“Q. Do you remember on or about the 3d day of February, 1914, of having in this building made photographs of any Chinese?”

“Q. I will ask you whether or not you recognize

any of the Chinese in the room whose photographs you made at that time?"

"Q. Do you remember at whose request you made these photographs?" [124]

Second. The Court erred in overruling the objections made on behalf of the defendants when the witness Bernice E. Jennings was called as a witness on behalf of the plaintiff, which objection was made in the following language: "Mr. Cook. At this time I desire to object to any evidence in this case under the indictment on the part of the prosecution on the ground that the offense as charged, of the conspiracy to conceal opium, after importation, is an unconstitutional act, and not an offense within the Federal jurisdiction."

Third. The Court erred in overruling the objections of the defendants to the following questions asked of the witness H. Matthai, whose was called on behalf of plaintiff, viz.:

"Q. What kind of message did you receive?"

"Q. Had there been any talk between you and this defendant Li Cheung, or between Li Cheung and any other person in your presence before the steamer 'China' reached San Francisco?"

"Q. What was the nature of the conversation?"

Fourth. The Court erred in denying the following motion made on behalf of the defendants, viz.:

"Mr. Cook. At this time I move to strike out, if the Court please, the testimony of this witness with relation to any of the overt acts, and in relation to the first and second overt acts alleged in the indictment, on the ground that it is irrelevant, incompetent

and immaterial, and on the ground that it appears affirmatively in evidence in this case that Yick Fat was acquitted by a jury in this case of any conspiracy, combination or agreement as alleged in the second count of the indictment; and that all of these defendants were acquitted of the offense charged in the first count of conspiracy to import this opium [125] into the United States; and that as to the second count of the indictment, as to the overt act the testimony of this witness if offered of the allegation of the indictment that it was in furtherance the conspiracy as alleged and to effect and accomplish the object thereof, that the said Li Cheung and Yick Fat, on the 30th day of January, 1914, on the steamship 'China' then and there lying and being in the Port of San Francisco, prepared seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes which said opium had theretofore been brought from some foreign port or place to the Grand Jurors aforesaid, unknown, contrary to law, for the purpose of causing the same to be delivered to the said Jung Quey, alias Sam Kee; and the second act alleged in pursuance of said conspiracy, that Li Cheung and Yick Fat on the same day, at the same time and place, delivered seven skins or bladders containing fourteen pounds of opium to one Matthai, a quartermaster on the steamship 'China,' I submit, under the evidence here there is no conspiracy whatever proven between Sam Kee or Mon Hing at the time any one of these acts testified to by this witness, nor as to any fact alleged as to these overt acts. That whatever was done there if done at all, was done

in pursuance of a conspiracy solely between Li Cheung and Yick Fat, and the jury have found that no such conspiracy existed by reason of acquitting Yick Fat."

Fifth. The Court erred in overruling the objections of defendants to the following questions asked of the witness Joseph Head who was called on behalf of plaintiff, viz.:

"Q. I show you this paper, and will ask you whether or not you found that on Sam Kee's person at the time he was arrested?" [126]

"Q. I will ask you whether or not at that time you made the arrest, you found on the person of the defendant Sam Kee the paper I herewith show you?"

"Q. How did it compare in appearance, handwriting and otherwise, with the paper just introduced in evidence here as having been found on the person of Sam Kee?"

"Q. What is the value of that kind of opium per skin, in the month of February?"

And the Court also erred during the examination of said witness in admitting in evidence, over the objection of defendants, a certain slip of paper having written thereon "Kearney 5484," which was marked "United States Exhibit No. 4."

And the Court also erred, during the examination of said witness, over the objections of defendants, in admitting in evidence a suitcase and rags, which were marked "U. S. Exhibit 7."

Sixth. The Court erred in admitting in evidence, upon the examination of Yung Kay, who was called as a witness for plaintiff of a certain translation of a

paper, purporting to have been translated by said witness, which reads as follows, viz.: "Jung Quen, Dear Uncle: I am sending an American of the Steamer to bring this paper. Please consult with this man when you see him and the paper and decide how the goods to be delivered and received. Tomorrow I will send you the goods by this man. By so doing it will not be disappointed. Upon receipt of this note, please send me words by this man, and we will know to be you by seeing the proof. Your nephew, You Ock (secret) from S. S. China."

And the Court also erred, during the examination of said [127] witness, in admitting in evidence, over defendants' objections, another purported translation made by said witness, which read as follows, viz.: "To Yik Fat: Your letter has been received. From Jung Quey."

And the Court also erred, during the examination of said witness in permitting the following question, and answer, over defendants' objection, viz.:

"Mr. Preston.—Q. I show you another paper, heretofore marked for identification as exhibit 4 across the back, on which are numerous black lines, which paper appears to be in Chinese characters. Will you kindly interpret that in English now.

Witness reading. I now send a man to bring goods, 28 cans upon receipt of same pay the bearer \$196.00. Answer immediately and the man bring it back tomorrow. Please come and talk together. From Yee Ock."

Seventh. The Court erred in overruling the objections of defendants to the following question

asked of the witness A. V. Kirchisen, called as a witness for plaintiff, viz.:

“Where was it?” (Said question referring to an alleged conversation in October or November, 1913.)

“Q. Had you or not made known to the customs officers any fact in connection with Li Cheung before you arrived on this last trip?”

And the Court erred in admitting in evidence, over defendants' objection, the testimony of said witness in relation to conversations had with Li Cheung, in relation to matters not alleged in the indictment.

Eighth. The Court erred in overruling the following questions asked upon the cross-examination of D. F. Belden, [128] who was called as a witness on behalf of defendants:

“Q. I will ask you if it is not a fact that he was in the opium in Nevada?”

“Q. Is it not a part of his reputation that opium has been found in his room time and time again?”

“Q. Is it not a part of his general reputation that he has sent for customs inspectors and other people and tried to enter into unlawful combinations with them for the purpose of getting opium?”

Ninth. The Court erred in overruling defendants' objections to the following questions asked of the witness Thomas R. Harrison, who was called as a witness for plaintiff, viz.:

“Q. Have you ever had any talk with either of these quartermasters Matthai or Kirchisen prior to the incoming of the steamer ‘China’ in January of this year?”

“Q. What kind of opium was it?”

And the Court also erred in sustaining the objec-

tions to the following questions asked by defendants' counsel of the same witness on cross-examination viz.:

“Q. What did you search this Chinaman for that came out of the saloon at 20th and Kentucky Streets?”

“Q. In what direction did that Chinaman go?”

“Q. Is it not a fact that you thought this Chinaman had some of the opium?”

Tenth. The Court erred in overruling defendants' objections to the following questions asked of Yick Fat, called as a witness for the defendants, on the cross-examination of said witness, viz.:

“Q. Did you say at that time that you ever saw this opium?”

“Q. Didn't you swear at the last trial you did not see this [129] opium, and did not know anything about it, and never saw anybody with opium?”

“Q. Didn't you swear at the last trial you did not know anything about opium, never hear of it, and never saw any opium?”

“Q. Why, didn't you swear about these sausages at the last trial?”

Eleventh. The Court erred in sustaining the objections to the following questions asked by defendant's counsel of the witness James W. Finn, called as a witness on behalf of defendants.

“Q. You know his general reputation in a business way?”

“Q. Didn't you make any investigation about him as the credit man of your firm?”

“Q. Have you ever heard his reputation discussed?”

Twelfth. The Court erred in overruling the objections of defendants to the following questions asked of the witness John Toland, viz.:

“Q. What kind of subjects have you discussed with him?”

“Q. What kind of English can he talk, if any?”

WM. HOFF COOK.

Attorney for Defendants and Plaintiffs in Error.

[Endorsed]: Lodged Aug. 6, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [130]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

No. 5441.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY *alias* Sam Kee, LI CHEUNG, MON
HING and YT YEE,

Defendants.

**Order Allowing Writ of Error and Appeal, and to
Operate as a Supersedeas.**

Now, on this 7th day of July, 1914, come the defendants Jung Quey, *alias* Sam Kee, Li Cheung, Mon Hing and Yt Yee, by Wm. Hoff Cook, Esq., of counsel, and present to the Court a petition praying for the allowance of a writ of error and appeal in the above-entitled cause, from the United States Circuit Court of Appeal, Ninth Circuit, to this court, and

also present with said petition their assignment of errors, and move the Court for an order allowing said writ of error and appeal, and fixing the amount of bond to be given by said petitioners thereon, and asking that such bond shall operate as a supersedeas bond;

Whereupon, it is ordered that a writ of error and appeal in this cause be, and the same is, hereby allowed as prayed for in said petition, and that said Jung Quey, *alias* Sam Kee, give a bond in the sum of \$3,000.00; and that the petitioners Li Cheung, Mon Hing and Yt Yee each give a bond in the sum of \$2,000.00, as provided by law, which said bonds shall operate as supersedeas bonds, and stay the execution of each of the judgments against each of said petitioners, and that said petitioners also give and file a joint bond in the sum of \$500.00 for costs on [131] such writ of error and appeal.

M. T. DOOLING,

District Judge.

[Endorsed]: Filed Jul. 7, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [132]

At a Stated Term of the District Court of the United States of America, for the Northern District of California, First Division, held at the Courtroom thereof, in the City and County of San Francisco, State of California, on Tuesday the 7th day of July, in the year of our Lord One Thousand Nine Hundred and Fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5441.

UNITED STATES OF AMERICA,

vs.

JUNG QUEY, LI CHEUNG, MON HING and JT
YEE,**Order Fixing Bail of Defendants, etc.**

In this case, on motion of Wm. H. Cook, Esq., Attorney for Defendants, and presenting Petition for Appeal from the judgment of this Court, and Assignment of Errors, the Court signed an order allowing the Writ of Error and Appeal herein, and ordered that the bonds of defendants pending the determination of said appeals be, and the same are hereby fixed as follows: As to Jung Quey, \$3,000, and as to Li Cheung, Mon Hing and Jt Yee, in the sum of \$2,000 each, and that said appellants give a Cost Bond on Appeal, jointly, in the sum of \$500. Further ordered that defendants have thirty days from this date within which to prepare and serve the proposed Bill of Exceptions herein on Appeal, and that upon the settlement thereof, defendants may file Additional Assignment of Errors. [133]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, Jung Quey, alias Sam Kee, Li Cheung and Mon Hing and Jt Yee as principals, and Illinois Surety Company, a corporation, as surety are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars, to be paid to the said United States of America certain attorney, executors, administrators or assigns; to

which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of July in the year of our Lord, One Thousand, Nine Hundred and Fourteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said Court, between the United States of America and Jung Quey, Li Cheung, Mon Hing and Jt Yee, a judgment was rendered against the said Jung Quey, Li Cheung, Mon Hing and Jt Yee and the said Jung Quey, Li Cheung, Mon Hing and Jt Yee having obtained from said Court a writ of error and appeal to reverse judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Jung Quey, Li Cheung, Mon Hing and Jt Yee shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above [134] obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day of year first above written.

(Chinese Character)

(JUNG QUEY) [Seal]

(Chinese Character)

(LI CHEUNG) [Seal]

MON HING, [Seal]

JT YEE,

[Seal]

FRANCIS KRULL.

ILLINOIS SURETY COMPANY. [Seal]

By Harold Parsons,

Its Attorney in Fact.

Form of bond and sufficiency of sureties approved.

M. A. THOMAS,

Assistant U. S. Atty.

[Endorsed]: Filed Jul. 8, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [135]

*In the United States District Court, in and for the
Northern District of California, First Division.*

No. 5441.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG QUEY et al.,

Defendants.

Order Extending Time to Docket Case.

Good cause appearing therefor by reason of unavoidable delay in the matter of the settlement of plaintiffs proposed amendments to defendants proposed Bill of Exceptions herein, it is hereby ordered

that the defendants may have Thirty (30) days further time within which to lodge the record on appeal herein with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 20, 1914.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Oct. 20, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [136]

*In the United States District Court, in and for the
Northern District of California, First Division.*

No. 5441.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JUNG QUEY et al.,
Defendants.

**Stipulation (and Order Extending Time to Docket
Case).**

It is hereby stipulated by and between the parties hereto that the defendants may have additional time to and including the 19th day of December, 1914, within which to lodge the record on appeal herein with the Clerk of the United States Circuit Court

of Appeals for the Ninth Circuit.

JNO. W. PRESTON,

Attorney for Plaintiff.

WM. HOFF COOK,

J. C. CAMPBELL,

WEAVER, SHELTON & LEVY,

Attorneys for Defendants.

So Ordered:

WM. C. VAN FLEET,

District Judge.

[Endorsed]: Filed Nov. 14, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [137]

Certificate of Clerk to Transcript on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 137 pages, numbered from 1 to 137, inclusive, contain a full, true, and correct Transcript of certain records and proceedings, in the case of the United States of America vs. Jung Quey et al., number 5441, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with "Praecipe" (copy of which is embodied in this Transcript) and the instructions of Wm. Hoff Cook, Esquire, Attorney for Defendants and Appellants herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Writ of Error is the sum of Seventy Six Dollars and Forty Cents (\$76.40) and that the same has been paid to me by the Attorney for the Appellants herein.

Annexed hereto is the Original Citation on Writ of Error and the Original Writ of Error with the return of the said District Court to said Writ of Error attached thereto.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 18 day of December, A. D. 1914.

[Seal]

WALTER B. MALING,
Clerk.

By C. W. CALBREATH,
Deputy Clerk.

C.M.T.

[Ten Cents Internal Revenue Stamp, Canceled
Dec. 18, 1914. C. W. C.] [138]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Jung Quey, alias Sam Kee, Yick Fat, Li Cheung and Jt Yee, vs. United States of America, Defendant in Error, a manifest error hath happened, to the great damage of the said Jung Quey, alias Sam Kee, Li Cheung, Mon Hing and Jt Yee, Plaintiff in Error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit, Court of Appeals for the Ninth Circuit together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 2d day of December, in the year of our Lord one thousand, nine hundred and fourteen.

W. B. MALING,

Clerk of the United States District Court, Northern District of California.

By C. W. Calbreath,
Deputy.

Allowed by:

M. T. DOOLING,

U. S. Dist. Judge. [139]

[Endorsed]: No. 5441. United States District Court, for the Northern District of California. Jung Quey et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Dec. 2, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [140]

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 2d day of December, A. D. 1914, duly lodged in the case in this court for the within named defendants in error.

By the Court:

[Seal]

WALTER B. MALING,

United States District Court, Northern District of California.

By C. W. CALBREATH,

Deputy Clerk.

[Ten Cents Internal Revenue Stamp. Canceled
Dec. 18, 1914. C. W. C.] [141]

Citation on Writ of Error.

United States of America,—ss.

The President of the United States, to United States of America and John W. Preston, Esq., United States for the Northern District of California,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for

the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Jung Quey, alias Sam Kee, Li Cheung, Mon Hing and Yt Yee, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 25 day of September, A. D. 1914.

M. T. DOOLING,

United States District Judge. [142]

Due service of the within citation is hereby admitted this 25th day of September, 1914.

JNO. W. PRESTON,

United States Attorney for the Northern District of California.

[Endorsed]: No. 2527. United States Circuit Court of Appeals for the Ninth Circuit. Jung Quey, *alias* Sam Kee, Li Cheung, Mon Hing, and Jt Yee, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, First Division.

Filed December 18, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2527

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JUNG QUEY alias SAM KEE, LI CHEUNG,
MON HING and JT YEE,

Plaintiffs in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

WM. HOFF COOK,
J. C. CAMPBELL,
Attorneys for Plaintiffs in Error.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk

Filed

MAR 5 - 1915

F. D. Monckton

No. 2527

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JUNG QUEY alias SAM KEE, LI CHEUNG,
MON HING and JT YEE,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

The defendants (plaintiffs in error here) were indicted jointly with one Yik Fat, for two alleged conspiracies. The indictment in the first count (Trans. p. 12) purported to charge a conspiracy to "import etc fourteen pounds of opium prepared for smoking purposes"; and the second count thereof (Trans. p. 6) purported to allege a conspiracy to "receive and conceal fourteen pounds of opium prepared for smoking purposes, which they knew had been imported contrary to law".

The defendants were placed upon trial, and on that trial the jury acquitted them all upon the first count, and found the defendant Yik Fat "not

guilty" upon the second count, and the jury disagreed as to the other defendants upon the second count.

Thereafter the remaining four defendants were again tried, and the jury found them "guilty" upon the second count (Trans. p. 22), and as to the special pleas of former acquittal the jury found (Trans. p. 22) in their favor upon their pleas of "former acquittal" of the "offenses charged in the first count"; and "for each of the defendants upon his plea of former acquittal of conspiracy with Yik Fat".

When the defendants were first arraigned upon the indictment demurrers were interposed on behalf of each of them to the indictment, and to each count thereof (Trans. pp. 9, 10, 11 and 12). These demurrers were overruled, whereas we contend that the Court erred in overruling these demurrers, and upon this appeal (all defendants having been acquitted upon the first count) we request this Court to review the order of the Court in overruling the demurrers to the second count of the indictment.

**THE COURT ERRED IN OVERRULING DEMURRER TO SECOND
COUNT OF INDICTMENT.**

The second count (Trans. p. 6) purports to allege a conspiracy to "receive and conceal" opium after importation, and purports to allege, in furtherance thereof, three overt acts by Li Cheung and Yik Fat

(Trans. pp. 6 and 7, fols. 5 and 6), and one overt act (Trans. p. 8, fol. 6) by Mon Hing and Jt Yee.

The first purported overt act is that Li Cheung and Yik Fat about January 30, 1914, brought seven skins of smoking opium into San Francisco; the second purported overt act is that the two same defendants on the same day "prepared seven skins of opium for the purpose of causing them to be delivered to Jung Quey"; the third purported overt act is that the same two defendants, on the same day, delivered seven skins of opium to one H. Matthai, a quartermaster on the steamer "China", for the purpose of having it delivered to Jung Quey, and the fourth purported overt act is that Mon Hing and Jt Yee, on the next day, received seven skins of opium.

None of the overt acts are alleged to have been "knowingly or fraudulently" done; and the fourth purported overt act is not, and cannot be, in any way connected with the three preceding overt acts as alleged.

No overt act is alleged to have been done by Jung Quey, and therefore we contend that the demurrer interposed by him should have been sustained, because there is no connection made that any overt acts were done with his knowledge in furtherance of any conspiracy, but on the contrary, although it is alleged that certain defendants prepared and delivered opium for the purpose of having the same given to him, there is no allegation that he knew of the conspiracy, or ever received it.

THE SECOND COUNT IS INSUFFICIENT.

The second count is insufficient for several reasons:

First.—Because it alleges no scheme to use any means, nor any agreement to use any means, which is one of the material deficiencies of the first count.

U. S. v. Cassidy, 67 Fed. 698;

U. S. v. Munday, 186 Fed. 375.

Second.—The second count purports to allege a conspiracy to “conceal and receive after importation” and the conspiracy as alleged does not show a conspiracy to do any unlawful act.

Clearly if this count of the indictment was based upon a violation of the act itself, instead of a conspiracy to do the act, it would not allege facts sufficient to constitute a public offense, and when a conspiracy to do an act is charged, it must be a conspiracy to do every act essential to constitute the offense itself, and, if such is not the conspiracy, it is not an unlawful confederation.

The Act of February 9, 1909, as amended January 17, 1914, provides that it shall be unlawful to import opium, etc.; such part of the act is only descriptive as to the kind of opium which cannot be imported, in and of itself it makes no public offense, but Sec. 2 of the Act describes certain acts as constituting public offenses, but in and of itself does not state all the facts essential and necessary to constitute such offense, or its description; that is, resort must be had beyond the terms and lan-

guage of Sec. 2 to ascertain, for example, as to what is meant by "import any opium * * * contrary to law", and what is "contrary to law" is to be determined by the language of the first section of the Act.

Therefore it is not sufficient in this indictment to use the language of the statute, and allege only that certain opium was imported "contrary to law".

Keck v. U. S., 172 U. S. 434.

Furthermore an indictment for "receiving or concealing" should allege at least, in the language of the statute, that the same was received "after importation", and showing the unlawfulness of such importation, and that the defendant "well knew that the opium had been imported contrary to law", and an indictment to conspire to "conceal and receive" opium after importation, without so alleging is fatally defective.

U. S. v. Carll, 105 U. S. 611.

Third.—It would not be unlawful at San Francisco, for two or more persons to conspire to "receive or conceal" opium in Mexico, which had previously been imported into the United States; in other words to give this Court jurisdiction a conspiracy must be alleged to "receive or conceal" opium in this district (or at least within the United States) after its unlawful importation, and no such conspiracy is herein alleged; this count simply alleges a conspiracy "to * * * receive and conceal

seven skins etc.”; when or where they were to be received or concealed is not alleged; therefore no conspiracy against any law of the United States is alleged; were the indictment for doing the forbidden act itself it would have to allege a receipt and concealment within the federal jurisdiction, and the allegations as to overt acts within the jurisdiction cannot aid a defective allegation of the conspiracy itself.

U. S. v. Britton, 108 U. S. p. 199;

U. S. v. Hess, 124 U. S. 484.

Fourth.—The first alleged overt act could not in any way tend to effect the object of a conspiracy to conceal opium “after importation”.

Fifth.—The second and third alleged overt acts could not tend to effect any unlawful conspiracy to “conceal or receive” unless the opium was to be delivered to Jung Quey within this jurisdiction, or at least at some place within the United States.

Sixth.—The fourth alleged overt act could not be in furtherance of any alleged conspiracy, if the facts as to the second and third alleged overt acts are true.

THE ACT IS UNCONSTITUTIONAL.

We contend that Congress has no power to legislate so as to punish for “receiving and concealing opium after importation”, and that therefore there can be no conspiracy to do that which Congress has no power or authority to declare unlawful.

The authority of Congress is limited to prohibiting importation, and the state alone can legislate as to the opium after it is actually within its territorial jurisdiction.

Keller v. U. S., 213 U. S. 138.

This question of the right to maintain this prosecution is raised in this record first by the demurrer, and second, by objection to the admission of any evidence in the case (Trans. p. 26).

The record shows the following proceedings then had in that particular:

“Mr. COOK. At this time I desire to object to any evidence in this case under the indictment on the part of the prosecution on the ground that the offense as charged of the conspiracy to conceal opium after importation is an unconstitutional act and not an offense with the federal jurisdiction.

The COURT. Overruled.

Mr. COOK. Exception.”

THE COURT ERRED IN EMPANELMENT OF JURY.

When the trial was about to proceed, as shown in the “bill of exceptions”, at page 23 of the transcript, objection was made to the jury panel by defendants’ counsel, as follows:

“It then and there duly appeared to the Court that the defendants had been previously placed upon their trial upon the indictment in this cause, and that upon such trial the jury had found all of the defendants ‘not guilty’ upon the first count of said indictment, and found the defendant, Yick Fat, ‘not guilty’

upon the second count of said indictment, and the jury upon said trial were unable to agree upon a verdict as to the defendants Jung Quey, alias Sam Kee, Li Cheung, Jt Yee and Mon Hing, upon the second count of said indictment. And that upon the impanelment of the jury upon said first trial of said cause that four talesmen were challenged by defendants by peremptory challenges, and that the names of said four talesmen were challenged by defendants by peremptory challenges, and that the names of said four talesmen so peremptorily challenged were in the jury-box and likely to be (21) called as prospective jurors upon the second trial of said cause.

That under the aforesaid circumstances and conditions the attorney for the defendants, prior to the clerk drawing any names from the jury-box for the second trial of said cause, requested the Court to order the clerk to withdraw from said box the names of said four talesmen so peremptorily challenged upon the first trial of said cause. Said request was made upon the grounds that necessarily the defendants would be obliged to again peremptorily challenge said four talesmen if called to qualify as jurors upon said second trial, with the result that the defendants would in reality, under the existing conditions, be only allowed six free peremptory challenges as allowed by law. Such request on behalf of defendants was by the Court denied, to which ruling defendants duly excepted.

Thereupon an impanelment of the jury was commenced, and said four names of said talesmen so peremptorily challenged were again among the first twelve talesmen drawn from the box for examination as to qualifications to serve as jurors upon said second trial. That defendants were obliged to and did again exercise peremptory challenges as to three of said talesmen so peremptorily challenged as aforesaid

upon said first trial, and the fourth of said talesmen was sworn and impaneled as a juror upon said second trial; and before the jury was impaneled and completed, and before said fourth talesman was sworn and impaneled, the ten peremptory challenges allowed to defendant by law had not all been exercised, the defendants had exercised the ten peremptory challenges allowed by law."

The precise question raised has never been determined by any Court so far as our research has gone, but the inevitable result of the action of the Court was to, in fact, reduce the number of peremptory challenges to which the defendants were by law entitled; and even though such diminution only consisted in one challenge it deprived the defendants of a legal and substantial right.

The record and facts disclosed that certain jurors had been challenged by defendants upon the first trial, and the experience of attorneys and judges is that a similar course would have to be pursued, in the matter of exercising peremptory challenges, if the same talesmen are again to be subjected to a test as to their impartiality and fairness, upon a second trial of the same cause.

Experience has shown that talesmen seem to take the exercise of a peremptory challenge as an affront, and a personal bias is then and there impressed upon the mind of such talesman against the attorney whom the talesman believes has impugned his integrity, so that he is an unfair juror to the client.

We submit that the reason assigned in the following cases sustain our contentions that the action of the Court, in thus curtailing the number of defendants' peremptory challenges, was prejudicial to their rights, and reversible error.

People v. Harris, 61 Cal. 136;

People v. O'Neil, 61 Cal. 435;

People v. Zeigler, 135 Cal. 462.

In the Zeigler case a jury had been empaneled, and an accepted juror was excused for illness, and the Court held that, on reforming a jury, the defendant was not restricted only to the remainder of his unused peremptory challenges, but was entitled to his full twenty peremptory challenges allowed by law.

We submit, therefore, that the Court erred in denying the request of defendants' counsel for the Court to direct the clerk to withdraw from the jury-box the names of the four talesmen who had been peremptorily challenged upon the first trial.

**THE GENERAL VERDICT OF GUILTY IS INCONSISTENT WITH
THE SPECIAL VERDICTS OF "FORMER ACQUITTAL" IN
FAVOR OF DEFENDANTS.**

The acquittal of all five of the defendants on the first count, and the verdict in favor of the four defendants on trial, of such former acquittal, is a finding that none of the overt acts as therein alleged were done by any of the defendants; and the ac-

quittal of the defendant Yik Fat upon the second count of the indictment, and the verdict of the jury (Trans. p. 22) that all of the defendants had been previously acquitted of any conspiracy, as alleged in the indictment, with the defendant Yik Fat.

Such verdict must necessarily find that none of the three overt acts, as first alleged in the second count, were done by Li Cheung in furtherance of the conspiracy, and also nullifies the fourth overt act alleged; and as the overt acts must be alleged and proved, the verdict of "guilty" is not sustained, and is at variance with the special verdict of former acquittal.

All of the three overt acts are alleged to have been done by Li Cheung and Yik Fat, and as Li Cheung was acquitted of any conspiracy with Yik Fat the special verdict of former acquittal in legal effect acquits Li Cheung and Jung Quey, because no overt act is alleged to have been done by Jung Quey, and the jury by the special verdict of former acquittal thereby, as an inevitable legal consequence, has found that Li Cheung did none of these overt acts in furtherance of the conspiracy; and the special verdict also has the effect of finding that the fourth overt act, in reference to Mon Hing and Jt Yee, was not in furtherance of the conspiracy as alleged.

We contend that the special verdict of former acquittal being inconsistent with, and irreconcil-

able with, the general verdict of "guilty", that such general verdict must fall, and the judgments and sentences pronounced thereon should be reversed.

**MOTION OF DEFENDANTS TO STRIKE OUT PORTIONS OF
TESTIMONY OF WITNESS MATTHAI REGARDING THE FIRST
THREE OVERT ACTS SHOULD HAVE BEEN GRANTED.**

The witness Matthai testified (Trans. p. 32) in substance and effect that he had certain conversations with the defendant Li Cheung, and took a letter to the defendant Jung Quey, and brought a letter back from Jung Quey, which he gave to the defendant Yik Fat; all of which testimony was introduced for the purpose of proving those first three overt acts, and in view of the record, as shown at page 25 of the transcript, establishing the former acquittal of all of the defendants in the first count of the indictment, and of the acquittal of Yik Fat in the second count of the indictment, the motion of the defendants to strike out such testimony should have been granted.

The proceedings in relation to such motion are found at the bottom of page 38 of the transcript, and the assignment of such error is found at page 140 in the transcript.

The proceedings at page 38 of the transcript read as follows:

"Mr. Cook. At this time, I move to strike out, if the Court please, the testimony of this witness with relation to any of the overt acts,

in relation to the first and second overt act alleged in the indictment, on the ground that it is incompetent, irrelevant and immaterial, and on the ground it appears affirmatively in evidence in this case that Yick Fat was acquitted by a jury in this cause of any conspiracy, combination, consideration or agreement as alleged in the second part of the indictment; that all of these defendants were acquitted of the offense charged in the first count of the indictment of conspiracy to import any of this opium into the United States, and that the second count of the indictment of conspiracy to import any of this opium into the United States, and that the second count of the indictment as to the overt act of the testimony of this witness in support thereof for the purpose it was offered by the United States Attorney is in support of the allegation of the overt act in furtherance of the further conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Li Cheung and Yick Fat, on the thirtieth day of January in the year of our Lord one thousand nine hundred and fourteen, on the steamship 'China', then and there lying and being in the port of San Francisco in the State and Northern District of California, prepared seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes which said opium had theretofore been brought into the United States from some foreign port or place to the grand jurors aforesaid, unknown, contrary to law, for the purpose of causing the same to be delivered to the said Jung Quey, alias Sam Kee; and the second act alleged in pursuance of that conspiracy, that (34) Li Cheung and Yik Fat on the same day, at the same time and place, delivered seven skins or bladders containing fourteen pounds of opium to one H. Matthai, a quartermaster on the steamer 'China'. I submit under the evidence

here there is no conspiracy whatever proved between anyone else than Yik Fat; no conspiracy proven between Sam Kee or Mon Hing at the time that any one of these acts testified to by this witness was concerned, nor as to any fact alleged as to these overt acts. That whatever was done there, was done, if it was done at all, was done in pursuance of a conspiracy solely between Yik Fat and Li Cheung, and the jury have found that no such conspiracy existed by reason of acquitting Yik Fat of conspiracy.

The motion was by the Court denied, and defendants duly excepted."

We contend that, by reason of the acquittal of Yik Fat, in relation to these overt acts, that the defendant Li Cheung and Jung Quey were also acquitted thereby, and that all of the evidence of this witness in relation to said overt acts, was therefore irrelevant, incompetent and immaterial, that the motion to strike out should have been granted.

The citation of any decisions to sustain this position are unnecessary, and in fact impossible, because the question involved must be determined solely upon the record of this case itself.

ERRORS OF COURT IN ADMISSION OF CERTAIN TESTIMONY.

The witness named A. V. Kirchisen was called as a witness on behalf of plaintiff (Trans. p. 61) testified that he was a quartermaster on the steamer "China" and had been such for about 18 months, and that he knew the defendant Li Cheung, and

against the objection of the defendants' counsel, the following questions were asked and answered by said witness:

"I had a conversation with him about opium in October and November, 1913.

Q. Where was it?

(Objected to by defendants upon the ground that it is incompetent, irrelevant and immaterial, and prior to any date alleged here, and prior to the importation of any opium as to the conspiracy which is charged. Objection was overruled, and defendants duly excepted.)

A. In the storekeeper's room, here in San Francisco, on the trip before.

(Mr. Cook. The same objection goes to all this line of testimony, which is objected to under the ruling of the Court.)

Q. Well, the trip on which she came in in January, did you have any conversation with him about opium before you came to San Francisco?

A. Yes, sir, between Yokohama and Honolulu.

Q. Had you or not made known to the customs' officers any fact in connection with Li Cheung before you arrived on this last trip?

(Defendants objected to the question upon the ground that it was hearsay; the objection was overruled and defendants duly excepted.)

A. Yes, sir.

Q. About how many conversations did you have, if you had more than one on the trip from Hongkong to San Francisco?

A. About half a dozen times.

Q. What was the tenor or substance of these conversations?

(Mr. Cook. The same objection.)

A. Taking opium ashore for him. He told me he had plenty of opium on board."

Error in this kind of interrogatory is specified as the seventh additional assignment of error, at page 143 of the transcript.

All of this testimony was clearly irrelevant, incompetent and immaterial matter, as it related to a different transaction, and in no way connected with the conspiracy, which is alleged to have been formed on January 29, 1914, to "receive and conceal opium" after importation. It was in direct violation of a settled rule of law as to other or different offenses, or conversations in relation thereto, are inadmissible, and the clear and unmistakable purpose of the district attorney in getting such testimony was to prejudice the minds of the jury, and the admission thereof was clearly prejudicial to all of the defendants in the case, and the objections to the admission of such testimony should have been sustained.

A witness named D. F. Belden was called as a witness on behalf of the defendants (Trans. p. 64), and he testified that he was in the real estate business, and had known the defendant Jung Quey for six or seven years, and knew his general reputation to be good. On cross-examination, against the objections of the defendant, the district attorney was permitted to ask the following questions:

"Q. I will ask you if it is not a fact that he was in the opium business in Nevada?

(Mr. Cook. Objected to and I assign it as a prejudicial error on the part of the district attorney.)

A. I never heard of it, I never heard of his connections with opium at all.

Q. Is it not a part of his reputation that opium has been found in his room time and time again?

(Mr. Cook. The same objection.)

A. Never.

Q. Is it not a part of his general reputation that he has sent for customs inspectors and other people, and tried to enter into unlawful combination with them for the purpose of getting opium?

A. I never heard of it. I have known of his reputation from his associations from his connections with my father-in-law in Nevada, in the railroad business furnishing contract labor. My father is general superintendent of the Southern Pacific Railroad and I believe Jung Quey furnishes Chinese labor to the railroad. I never heard anything against his reputation."

The permission of such cross-examination is specified as error, in the Eighth Additional Specifications of Error, at page 144 in the transcript.

Such conduct on the part of the district attorney was reprehensible, and questions were asked for the purpose of prejudicing the jury against the defendants, and the Court, in permitting such conduct by the district attorney, clearly permitted testimony, in the form of inferential questions, imputing the reputation of the defendant Jung Quey, to be asked, and we urge this matter as a reversible error.

A witness named Thomas R. Harrison, who was called as a witness for plaintiff (Trans. p. 69) testi-

fied that he was an inspector of customs, and against the objection of defendants, was permitted to be asked and answer the following questions:

“Q. Have you ever had any talk with either of these quartermasters, Matthia or Kirchisen prior to the incoming of the steamer ‘China’ in January of this year?

(Defendants objected to the question as incompetent, irrelevant and immaterial and that any conversation that this man may have had with the quartermasters on any trip previous would be hearsay. Objection overruled and defendants duly excepted.)

A. Yes, sir. The first information I had was on the trip previous, the trip the opium was landed; that is previous to January 26th of this year.”

The foregoing testimony was clearly hearsay, and was irrelevant, incompetent and immaterial, and was elicited solely for the purpose of endeavoring to show a different transaction than the conspiracy as alleged in the indictment, and was for such reasons inadmissible, and the effect of permitting such testimony was clearly prejudicial to the rights of the defendants.

The specification of the foregoing as error is found as the ninth at page 144 of the transcript, in the additional assignments of error.

The Court erred in admitting the evidence, over the objection of defendants, Government’s Exhibit No. 3 (Trans. p. 53), which exhibit read as follows:

“To Yik Fat: Your letter has been received. From Jung Quey.”

The Court erred in admitting such exhibit, against defendants' objection, upon the ground that the same was irrelevant, incompetent and immaterial, and the proper foundation not laid. The exhibit was a purported translation of the paper which the witness Matthai testified that he received from the defendant Jung Quey, and which he delivered to Yick Fat, and there is no evidence that he ever delivered it to Li Cheung; and the witness Matthai testified that he delivered the said paper, after he received it, to the witness Head, and the witness Head testified that he had it translated, and the translation was made. And that after the translation was made that he delivered it to the witness Matthai, and the witness Matthai testified that he delivered it to Ah Fat (not a defendant in the case) and he told Ah Fat to deliver it to the defendant Yik Fat.

Therefore there was no proper connection or proof of the delivery of this paper as any part of the conspiracy, to any one of the defendants in the case, and no foundation laid for its introduction, and as the defendant Yik Fat had been acquitted, the delivery thereof to him could not be used, and should not have been permitted against any of the defendants; and for these reasons the Court erred in the admission of such exhibit, and the specification of such error is designated as the tenth of the original assignments of error at page 135 of the transcript.

ERRORS IN REFUSING THE INSTRUCTIONS OF DEFENDANTS.

The Court erred in refusing to give the jury the following instructions requested by the defendants:

“I instruct you that if you find from the evidence that the quartermaster Matthai took any opium prepared for smoking purposes from the steamship ‘China’ on January 30th, 1914, while she was in the port of San Francisco, and that he did so with the permission of the Government, through its duly authorized officers, then I instruct you that such opium was not being unlawfully transported after its importation, and the receipt of such opium by any person thereafter, by any person, from said quartermaster, was not an unlawful act, and therefore cannot be considered by you as an unlawful act done in pursuance of the conspiracy, as alleged in the indictment, and such testimony cannot be considered by you as establishing in any degree the guilt of any of the defendants of the conspiracy as alleged in the indictment.”

The testimony of the witness of the Government shows that, any opium testified to, was taken from the steamer with the permission of the Government, and therefore there could not have been any unlawful conduct on the part of any one in relation thereto.

Such license and permission of the Government's officers clearly made any transportation or receipt of any such opium lawful, and no person could be held responsible for receiving such opium as an unlawful act.

The officers of the Government are not permitted to voluntarily place unlawfully imported opium in the possession of the person, and then charge them with the unlawful possession thereof and therefore the jury should be instructed to that effect, and the Court erred in refusing such instructions; and the assignment of such error is found at page 137 of the transcript.

The Court erred in refusing to give the following instructions requested by defendants:

“A conspiracy has these elements, first, an object to be accomplished, which must be the commission of a public offense against the United States, and not against the laws of any particular state; second, a plan or scheme embodying means to accomplish the object; third, an agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme or by effectual means, and fourth, an overt act by one or more of the conspirators in furtherance of and to effect the object of the conspiracy.”

This instruction is in accord with our contention that the Court erred in overruling the demurrers to the indictment, by reason of the failure of the indictment to allege all of the necessary elements of the conspiracy, and we rely upon the citations made in support of the demurrer as sustaining our position that error was committed by the Court in refusing this instruction. We contend that it was necessary for the indictment to allege the plan or

scheme by embodying the means to attain the object, and that the overt acts must be such as to accomplish the object by the means embodied in the original scheme of the conspiracy.

U. S. v. Munday, 186 Fed. R. 375.

The Court erred in denying the defendants' motion for a new trial.

Among the grounds urged in the motions for a new trial were that the evidence was insufficient to sustain the verdict (Trans. p. 117).

In this behalf the evidence shows that certain skins or bladders, testified to by witnesses for the prosecution as having contained opium, were produced before, and shown to the jury; that a number of such skins were testified to as having been seven at one time, but that only five skins were recovered by the arresting officers; and the district attorney never offered any of said skins in evidence, for the apparent reason that proper foundation therefor was never laid.

We contend therefore that all of the evidence in relation thereto was irrelevant, incompetent and immaterial, because without the admission in evidence of the things themselves there was nothing in the record in the case which justified the jury in applying the evidence of the various witnesses to such five or seven skins of opium.

If such testimony in relation to such skins is eliminated in this case all of the evidence in re-

lation to any overt acts, in so far as the same relate to smoking opium, is wanting.

The original purpose evidently with the prosecution in the case was to endeavor to show that those particular five skins were the physical subject of the conspiracy itself, and we contend, that having neglected, or failed, to have offered, or introduced such physical exhibits in evidence, left the case with the failure of proof, and that therefore there was insufficient evidence to sustain the verdict, and that the judgment thereof should be reversed.

We submit, and earnestly contend, that for such reasons as hereinbefore stated that the judgment as against all of the defendants in this case should be reversed.

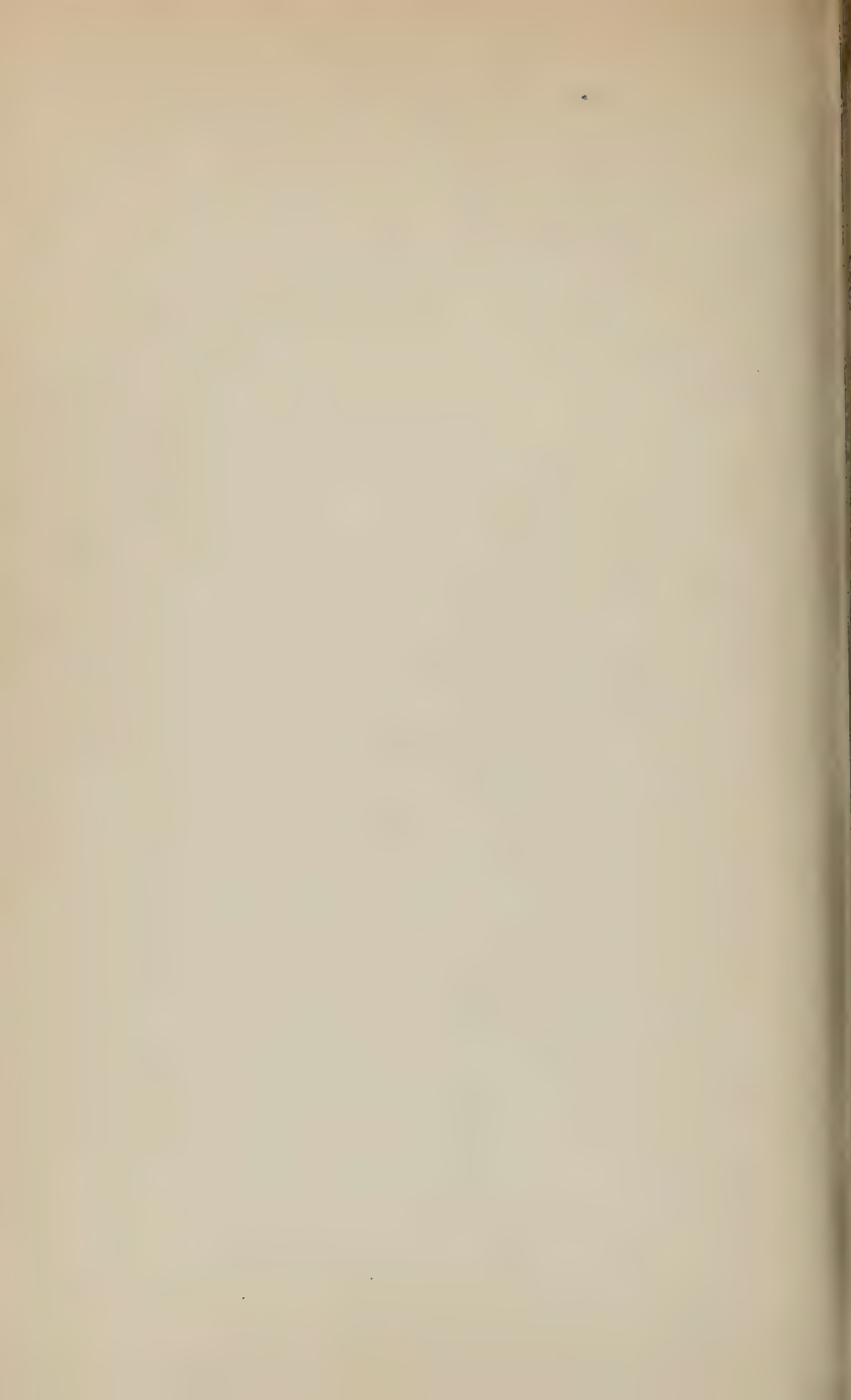
Dated, San Francisco,

March 6, 1915.

WM. HOFF COOK,

J. C. CAMPBELL,

Attorneys for Plaintiffs in Error.



11
No. 2527.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUNG QUEY, alias SAM KEE, LI
CHEUNG, MON HING and JT YEE,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

JOHN W. PRESTON,
United States Attorney,
Attorney for Defendant in Error.

Filed this.....day of....., 1915.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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F. D. Monckton,

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REPLY BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The statement of facts in the brief of Plaintiff in Error is sufficient for the purposes of this case, we believe, and we will pass directly to the law points involved.

SUFFICIENCY OF COUNT TWO OF INDICTMENT.

First, it is contended that no overt act is alleged against defendant, Jung Quey, the overt acts pleaded being by other defendants. Of course, the very definition of a conspiracy necessarily renders argument on this point unnecessary. Section 37 of the Penal Code reads as follows:

“Section 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years, or both.”

It will be seen that the statute in terms permits the overt act “of one or more” of the parties to be sufficient for the guilt of all.

“In a conspiracy, every act of one of the conspirators in furtherance of a common design, is in contemplation of law, the act of all.”

3 Encyc. U. S. Rep. 1102, citing cases.

“The gist of the offense is still the unlawful combination, which must be proven against all the members of the conspiracy, each one of whom is then held responsible for the acts of all.”

American Fur Co. vs. U. S., 2 Pet. 358, 7 L. Ed. 450;

Bannon vs. U. S., 156 U. S. 464, 468, 39 L. Ed. 494.

The objection that, in charging the overt acts, the words “knowingly or fraudulently” do not appear, seems hypercritical for the reason that these words appear in the conspiracy charge, and it is alleged that “the overt acts were done in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof.” If done in furtherance of a conspiracy unlawfully, wilfully, knowingly, wickedly,

corruptly and feloniously entered into, how could the overt act be otherwise than “knowingly or fraudulently done?” The overt act, of course, need not be a crime or within itself an unlawful or forbidden act. The overt act is simply to impart vitality to the conspiracy and bring it within the condemnation of the statute.

Again it is urged that the means by which the conspiracy was to be accomplished is not alleged. Counsel omits well-defined distinctions in making this claim. The true rule in this behalf is

“When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in an agreement to accomplish a purpose not in itself *criminal* or *unlawful* by criminal or unlawful means, the means must be set out.”

3 Ency. U. S. Repts. 1104, citing

Pettibone vs. U. S., 148 U. S. 197, 37 L. Ed. 419;

Dealy vs. U. S., 152 U. S. 539, 38 L. Ed. 545.

Now, Section 1 of the Opium Act, as amended by the Act of January 17th, 1914, is as follows:

“That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; PROVIDED, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.”

From this it will easily be seen that receiving and concealing unlawfully imported smoking opium is absolutely forbidden under any and all circumstances and for any and all purposes. Now, why the necessity of alleging "means" by which it was to be carried out? There can be no lawful concealment. The "means" then becomes a false quantity so long as the purpose to conceal exists and is pleaded.

Next, it is contended that the use of the words "contrary to law" in count two of the indictment (Tr. p. 6) renders the said count fatally defective.

The count charges in apt language a conspiracy, feloniously entered into, to knowingly receive and conceal fourteen pounds of smoking opium, "which as they (the defendants) then and there knew, had been imported contrary to law."

We submit that when grammatically analyzed the words quoted mean that the opium had been as a fact imported contrary to law, as the defendants then and there well knew. In other words, the unlawful importation is pleaded as a fact, and the defendants' knowledge thereof is likewise pleaded, and the two elements make the crime condemned by the statute. In other words, counsel omits to give due regard to the punctuation of phrases referred to.

Now, inasmuch as the Act, in section one thereof, does, as above stated, condemn *all* importations of smoking opium, there can be no need of showing any facts other than mere importation to show an act "contrary to law."

The case of *Keck vs. United States*, 172 U. S. 434,

cited by counsel is in fact against the contention urged by counsel, and distinguishes between that case and the case at bar by the use of this language:

“The generic expression ‘import and bring into the United States’ did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements.”

Now, if the importation is *per se* contrary to law, is not the inference clear that no allegations showing how or why it became contrary to law are necessary?

Next, counsel say that the indictment does not charge a conspiracy within the jurisdiction of the District Court for the Northern District of California. The indictment does allege a conspiracy formed in the Northern District of California to receive and conceal opium unlawfully imported into the United States. Now this is sufficient. The conspiracy is the crime to be punished. It certainly should be punished in the district of its formation.

“If a conspiracy be entered into within the jurisdiction of a court a subsequent overt act may be done anywhere without affecting the jurisdiction.”

3 Ency. U. S. Rep. 1103, citing
Dealy vs. United States, 152 U. S. 539;
Hyde vs. Shine, 199 U. S. 62.

“It has been decided that if the conspiracy be entered into within the jurisdiction of the trial court, the indictment will lie there though the overt act is shown to have been committed in another jurisdiction, or even in a foreign country.”

Dealy vs. United States, *supra*;
In re Palliser, 136 U. S. 257.

Counsel's contention that a conspiracy in the Northern District of California to receive at a point in Mexico smoking opium that they knew had been unlawfully imported and was still in the United States would not be a crime, seems, to say the least, doubtful.

But the indictment when fairly read and construed could not be held to admit of such a construction. It is a crime against the law of the United States we are trying to charge, and the language that defendants, in the jurisdiction of the court, were conspiring to conceal opium already in the United States in violation of law, means a conspiracy to be executed in the United States.

Counsel argues that the first overt act alleged could not be in furtherance of a conspiracy, and that the second and third are inconsistent with the fourth. It is nowhere argued that the evidence did not support the overt acts alleged. Consequently, inconsistencies, if admitted, would not vitiate the indictment.

THE ACT NOT UNCONSTITUTIONAL.

Both this Court and the Supreme Court have, since the filing of counsel's brief, held the Act in question to be constitutional, and further discussion of this point is superfluous.

Steinfeld vs. United States;

Brolan et al vs. United States.

EMPANELMENT OF JURY.

On this, the second trial of defendants, four jurors who had in the former trial been peremptorily challenged

by defendants, were again in the box and were drawn on the first twelve called in the box. Three were peremptorily challenged. The fourth was immediately, and while the defendants yet had six challenges, sworn as a juror. Jurors possessing the qualifications required are subject to challenge for cause only upon a showing of express or implied bias. The legal bias referred to is defined in California by statute. See Penal Code, Secs. 1073-4.

Because a juror has been challenged peremptorily does not *per se* create a state of mind prejudicial to defendant. On the contrary, the presumption would be against such a conclusion. Likewise the qualification as against a challenge for cause is to be tried by the judge and except for an abuse of discretion no reversal would be warranted.

Cal. Penal Code, 1061-2, 1077-8, 1083;

Judicial Code, Sec. 287;

Missouri, K. & T. R. Co. vs. Elliott, 102 Fed. 96.

No showing is made that the juror referred to was either biased or in any way other than a fair and impartial individual.

SPECIAL AND GENERAL VERDICTS NOT INCONSISTENT.

The jury rendered the following verdicts:

“We, the Jury, find Jung Quey, Li Cheung, Mon Hing and Jt Yee, the defendants at bar, guilty on the second count of the Indictment herein. John G. Barker, Foreman.”

“We, the Jury, find for the defendants at the bar upon their pleas of former acquittal of the offenses charged in the first count of the Indictment. John G. Barker, Foreman.”

“We, the Jury, find for each of the defendants at the bar upon his pleas of former acquittal of conspiracy with Yok Fat alone. John G. Barker, Foreman.”

The special verdict acquitting of conspiracy with Yok Fat alone does not mean that the defendants did not conspire together or with unknown persons. No inconsistency appears, and in our judgment this is self-evident.

RULINGS OF ADMISSION OF EVIDENCE.

Statements of one of the conspirators, showing this attitude or bent of mind, is competent.

Greene vs. United States, 146 Fed. 784.

It is competent on the cross-examination of a witness giving the defendant a good character to ask such questions as will legitimately test the value of the evidence given.

“In *People vs. Gordon*, 103 Cal. 573, it is said that a witness ‘having testified as to the defendant’s general good character, his opinion and the value of it may be tested by asking the witness, on cross-examination, whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him.’ And in *People vs. Mayes*, 113 Cal. 624, it is said: ‘While it is not permissible to give evidence of wrongful acts for the purpose of impeaching the witness, it is proper upon cross-examination of a witness who has given testimony,

either for sustaining or impeaching the credibility of another witness, to question him with reference to his knowledge of specific acts, and with reference to the specific acts themselves, for the purpose of overcoming the effect of his testimony upon the direct examination.' ”

People vs. Perry, 144 Cal. 750.

INSTRUCTIONS.

Counsel's brief, page 20, sets out an instruction embodying a certain doctrine opposed to the law touching decoy transactions. This instruction was properly refused.

“When a person, or those officers of the law who are charged with its enforcement, have reason to believe that a crime is about to be committed or attempted, there is nothing legally or morally wrong in laying a trap, setting out a decoy, or placing a detective in observation, or in entering into a conspiracy with others to detect and punish the offenders; and the waylaying and watching to detect the commission of crime by the prosecutor or witnesses, in order to obtain evidence with which to convict, will not constitute a defense in a prosecution for the commission of the crime or offense.”

Wharton's Crim. Law (Vol. I, 11th Ed.), Sec. 190, p. 229, citing

Grimm vs. United States, 156 U. S. 604, 39 L. Ed. 550;

Andrews vs. United States, 162 U. S. 420, 40 L. Ed. 1023; and many others.

The second instruction complained of (Counsel's

brief, p. 21) was properly refused because in this case, as we have heretofore argued, the purpose was *per se* a violation of law whatever means might have been used, and this renders the means a negligible quantity in the case.

FAILURE TO OFFER CERTAIN OPIUM IN EVIDENCE.

It was not necessary to our case to prove that the seven skins of opium found near the scene of arrest was the actual opium smuggled ashore. Plenty of evidence aside from this existed upon which a conviction could be supported.

The identification not being absolutely complete and the evidence being cumulative only, no necessity appeared for offering anything in evidence except the suitcase and rags that were properly identified. That opium was in the possession of Li Cheung and delivered to defendants, Mon Hing and Jt Yee, is certain and without serious contradiction.

CONCLUSION.

We believe the record free from error and submit that judgment ought to be affirmed.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,
Attorney for Defendant in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JUNG QUEY alias SAM KEE, LI
CHEUNG, MON HING and JT YEE,
Plaintiffs in Error,

VS.

UNITED STATES OF AMERICA,
Defendant in Error.

**PETITION FOR A REHEARING ON BEHALF OF
PLAINTIFFS IN ERROR.**

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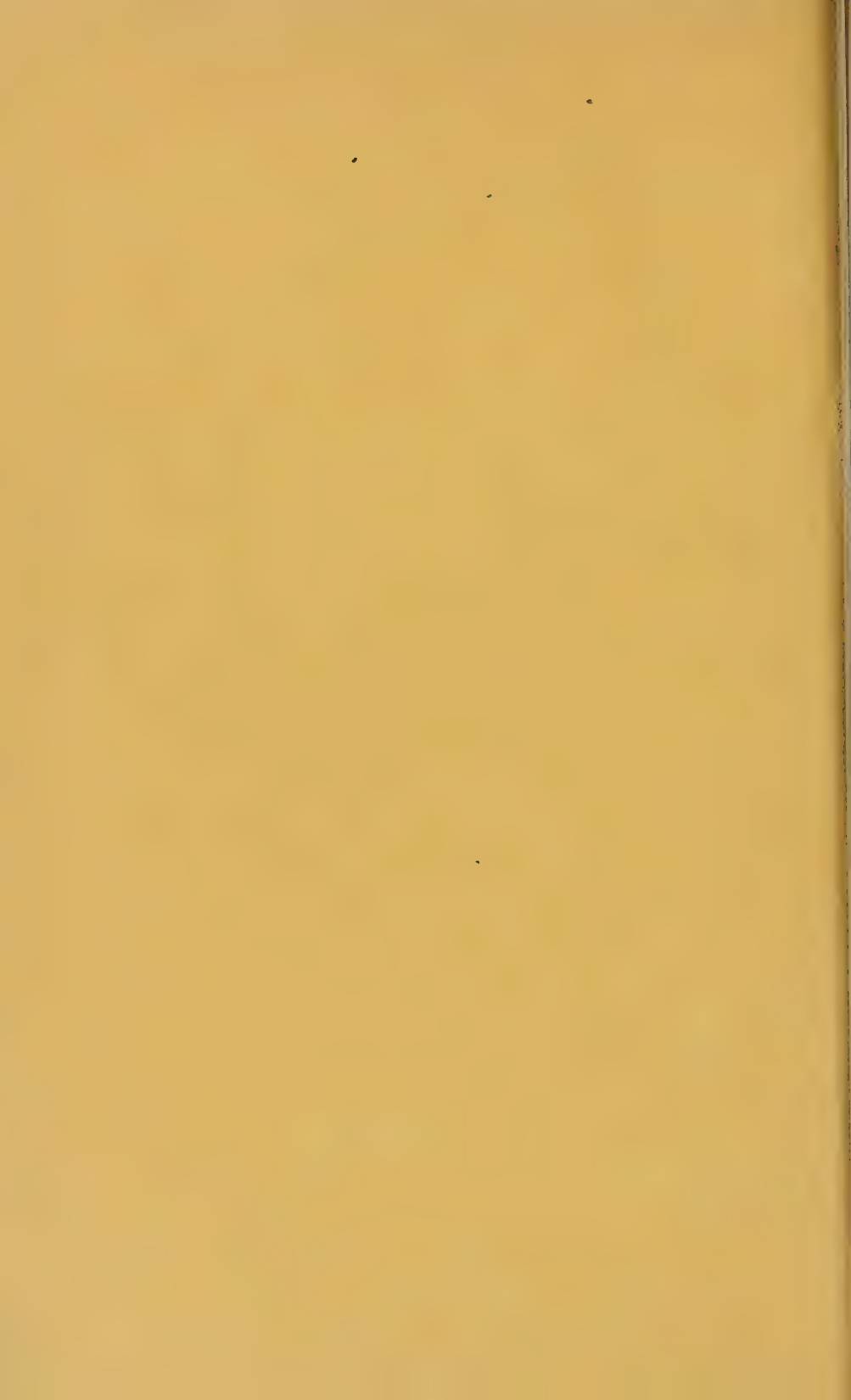
Filed this **Filed** *day of May, 1915.*

MAY 29 1915

FRANK D. MONCKTON, Clerk.

F. D. Monckton,

By **Clerk.** *Deputy Clerk.*



No. 2527

IN THE

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JUNG QUEY alias SAM KEE, LI
CHEUNG, MON HING and JT YEE,

Plaintiffs in Error,

vs.

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Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals, for the Ninth
Circuit:*

Plaintiffs in error respectfully petition that the decision of this court herein be set aside and that a rehearing of the cause be granted.

The ground of this application is that the participation of the Government officials in the case has not received adequate consideration at the hands of the court. This subject-matter is discussed in the opinion as follows:

"An instruction requested by the defendants to be given to the jury and which the Court refused, to which an exception was taken and is here assigned as error is as follows:

'I instruct you that if you find from the evidence that the quartermaster Matthai took any opium prepared for smoking purposes from the steamship China on January 30th, 1914, while she was in the port of San Francisco, and that he did so with the permission of the Government, through its duly authorized officers, then I instruct you that such opium was not being unlawfully transported after its importation, and the receipt of such opium by any person thereafter, by any person, from said quartermaster, was not an unlawful act, and therefore cannot be considered by you as an unlawful act done in pursuance of the conspiracy, as alleged in the indictment, and such testimony cannot be considered by you as establishing in any degree the guilt of any of the defendants of the conspiracy as alleged in the indictment.'

The correctness of the ruling of the trial court in respect to that matter may be sufficiently shown by a reference to the case of *Grimm v. United States*, 156 U. S. 604, where a post-office inspector, Robert W. McAfee, sent through the post-office certain letters to fictitious persons."

The court proceeds to quote from the opinion in the *Grimm* case. This decision stands for the doctrine more definitely stated in the recent *Woo Wai* case, that the commission of a crime is not deprived of its unlawful character by reason of the fact that the Government officers have knowingly consented or even participated therein, provided, how-

ever, that they have not induced the original guilty purpose.

The case at bar presents a different question entirely. We are not concerned here with the law of entrapment; the refused instruction does not go to that subject at all. On the contrary, it presents the issue whether under the facts here it was possible to commit the crime charged.

The material parts of the statute are:

“That if any person * * * shall receive, conceal, buy, sell, or in any manner facilitate the importation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law * * *”

The crime thus involves an act or conspiracy to act after importation of opium. And in order that the crime may be committed the accused must know that the opium has been brought into the United States contrary to law.

The second count of the indictment, upon which the defendants were convicted,—there was an acquittal on the first—assumes the crime of importation to have been successfully committed and that upon its spoils a second conspiracy was conceived and consummated. Such a condition manifestly never existed. The seven skins or bladders of smoking opium were never unlawfully in the country and to the following demonstration of that fact, we respectfully draw the attention of the court.

The officers of the Government were informed of the presence of the opium on board the S. S. China and thereafter authorized and effected its entrance into the United States. (Trans. of Rec. p. 33.) Captain Head, with the assistance of other customs officers, directed the movements of Matthai, Kirchisen and the opium. (See Test. of Williams. [Trans. of Rec. 44, 45, 46], Test. of Joseph Head [Trans. of Rec. 48 to 52 inc.], Test. of Kirchisen [Trans. of Rec. p. 62, middle paragraph], Test. of Harrison [Trans. of Rec. 68 to 72 inc.].) Kirchisen was also an agent for the Government. See his own testimony and the testimony of Head. (Ref. supra.)

When by authority of Captain Head, the opium came over the side of the China and passed the gang plank, it was met by Inspector Williams, inspected, stamped with the mark of his approval and permitted to enter. We quote what the inspector said:

"I am inspector of customs, and was such on January 30th of this year. I know Quartermaster Matthai. I remember on or about January 30th of this year his having passed down the gang plank with a suitcase. I put my mark on it. The suitcase now shown to me is the one with my mark on it. I had instructions to let him pass with the suitcase. I looked at the contents of the suitcase, and it had opium in it; it was in skins, and it was smoking opium and was in the kind of skins which you show me now. * * * They told me it was opium, and I understood it was to be passed. The bladders were in the suitcase as they appear here today, and the bladders here in this suitcase shown to me look

like those that were in the suitcase when I passed the suitcase. I concluded that it was opium. My mark on it was 'W' with a cross through it. The mark I put on the suitcase indicated that I *as a custom inspector*, had inspected the contents and had passed it as being permitted to land so that a man coming along with mark on it would pass anybody at the gate; that was the effect of this mark that I put on the suitcase. So far as I was concerned, or anybody at the gate at the pier was concerned, Matthai might have taken it anywhere, and not be subjected to any further inspection. Matthai and Kirchisen went ashore together at that time. I had never seen them before I saw them at the gangplank. I was told to pass to German quartermasters."

(Trans. of Rec. 44 to 46 inc.)

Harrison, another customs inspector, saw the opium come off the ship and saw the skins at 3rd and Townsend streets where he took them to the Olympia Hotel and then turned them into the Government's property room for the night. He then took the opium to the Olympia Hotel, and after the defendants were arrested, turned it over to the seizure clerk (Trans. of Rec. pp. 68 to 71 inc. Direct exam.). Captain Head also had actual possession of the opium for some time. It was turned over to him by Harrison and kept by him overnight and until the following afternoon (Trans. of Rec. p. 49).

No part of that shipment of opium unlawfully entered the United States. Actual contraband within the country was a necessary element. That ele-

ment was lacking and no conspiracy could be, or was accomplished.

A situation not nearly so plain as that at bar is presented in cases where a pretended accomplice in the alleged crime of burglary or larceny has communicated the apparently unlawful purpose to the owner of the property, who thereupon permits it to be taken while the informer participates in the proceeding. In these cases it has been held that no crime is committed for the reason that the owner consents and through a representative actually participates in the act and that the unlawful intent alone does not render the act criminal. The reasoning upon which this conclusion is based is somewhat refined. It is not nearly so convincing as in the case at bar, because here we are concerned with a statutory offense comprising certain elements; under the proof one of these is entirely wanting. However, we cite the line of authorities just discussed because of the analogy presented thereby.

In *People v. Collins*, 53 Cal. 185, it was held:

“Parnell informed the Sheriff that Collins had requested him to enter a house in the night time, and steal therefrom a sum of money which he knew to be concealed there, the money to be divided between them. By advice of the Sheriff, Parnell agreed to do so, for the purpose of entrapping Collins, and accordingly entered the house, secured the money, marked it so that it could be identified, and after delivering it to Collins gave a signal, when the Sheriff arrested Collins with the money in his possession. *Held*, that, inas-

much as Parnell alone entered the building, and did so without felonious intent, there was no burglary committed, and therefore Collins could not have been privy to a burglary" (Syllabus).

In *People v. Clough*, 59 Cal. 438, the same question was again considered. While the court sustained the conviction because the facts did not bear out this theory of defense, it stated in its opinion, in which Circuit Judge Ross, then a member of the state court, concurred:

"It is claimed that one Ulter was associated with the defendant in the taking of the property, and that there was an understanding between Gage (the party alleged to have been robbed) and Ulter, that Gage should meet Ulter and the defendant at an appointed time and place and go through the form of being robbed by the defendant. *If the evidence supported this theory, it would result, that the act did not constitute the crime charged.* 'Robbing is the felonious taking of personal property in the possession of another, from his person and against his will, accomplished by force or fear'."

In *Allen v. State*, 40 Ala. 334 (91 Am. Dec. 477), it was held:

"Where defendant proposes to a servant that they rob the office of the latter's employer, and the servant communicates this fact to his employer, who informs the police, and where the employer, acting under the advice of the police, furnishes the servant with a key to his office, by means of which, at an appointed night, the servant unlocks the office door, and together with the defendant enters the room, where they

are arrested, the defendant is not guilty of burglary" (Syllabus).

In *Williams v. State*, 55 Ga. 391, it was held:

"If one pretending by way of artifice to be an accomplice but believed by the accused to be a real accomplice, performs, at the instance of the owner of the goods, acts amounting to the physical constituents of larceny, the pretended accomplice represents the owner and not the accused, although the accused may have concurred in the acts and thought he prompted them, and therefore for them the accused cannot be held guilty."

In *Love v. People*, 160 Ill. 501, it was held:

"The indictment for burglarizing Hoag's office, under which this defendant was convicted, rests on this evidence. One does not escape the convictions that Robinson entered that office with Hoag's consent. If Robinson entered the building with Hoag's consent, and took the money with no intent of stealing it, but in pursuance of a previously arranged plan between him and Hoag, intending solely to entrap the defendant into the apparent commission of a crime, it is clear that no burglary was committed; there being no felonious intent on the part of Robinson in entering the building or taking the money. If no burglary was committed by Robinson, because of an absence of a felonious intent, the defendant could not have been an accomplice and privy to a burglary."

In cases of this character courts often confuse the principle just presented with the doctrine of entrapment. They are, however, distinct. The activity of the owner of the property may be so reprehensible that public policy will not sanction a conviction of

the apparent offender. The same result may follow from the conduct of the Government officials, as in the *Woo Wai* case. But irrespective of this factor, the effect of the participation of the customs officers here was to legalize the importation of the opium and thereby to make it impossible in fact to commit the crime charged. That the plaintiffs in error did not know these things is, of course, immaterial; one cannot be a criminal by imagination; guilty intent alone does not constitute crime.

In view of the foregoing it is submitted that the decision of this court upholding the trial judge in refusing to give the requested instruction should be reconsidered.

**THE INSTRUCTION CONCERNING THE TESTIMONY OF
ACCOMPLICES CONSTITUTED ERROR.**

The trial court left it to the jury to determine whether Matthai and Kirchisen were acting for the Government and solely to secure evidence, or on the other hand were guilty participants in the crime (Trans. p. 102). This, of course, did not remedy or affect in any way the error committed in refusing the instruction discussed above. On the contrary, it made essential an instruction upon the subject of the testimony of accomplices and thereby paved the way for another prejudicial error. The court charged:

“The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care. And the jury

should not rely upon it unsupported, unless it produces in their minds the most positive conviction of the truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the minds of the jury full and complete conviction of its truth."

(Trans. p. 102.)

The court refused to give the following instruction:

"A conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense, as set forth in the indictment; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof."

(Trans. pp. 108-9.)

In so ruling, the trial judge undoubtedly relied upon the practice in some circuits where the common law upon the subject in hand obtains. He was guided, no doubt, by the impression which seems to prevail that this is a matter of settled federal procedure. Such, however, is not the case. The law of evidence in criminal cases as administered in the federal courts is the law of the particular state in which the trial court is sitting as established there at the time when the state was admitted into the Union. As a general proposition this is subject to qualification where a statute has been enacted by Congress

upon the subject, but since there is no federal statute concerning the testimony of accomplices, the general rule will obtain here.

The earliest case presenting this question is *U. S. v. Reid*, 12 How. 361. That case arose in Virginia. It was held that the law by which the admissibility of testimony in criminal cases must be determined, was the law of that state as it was when the courts of the United States were established there by the Judiciary Act of 1789.

This decision was cited and applied in a case arising in Colorado, which was admitted into the Union long subsequent to the Act of 1789—*Withaup v. U. S.*, 127 Fed. 530. Mr. Justice Van Devanter, then a member of the Circuit Court of Appeals for the 8th Circuit, wrote the following opinion:

“The territory embraced in the State of Colorado had not been acquired by the United States in 1789 or 1790, and was not admitted into the Union as a state until 1876. So there are here no known and established local rules in force in 1789 or 1790 which could have been contemplated by Congress when the judiciary and crimes acts were passed. When, however, Colorado was admitted into the Union as a state, it had known and established rules concerning evidence in criminal cases. An act of the territory of Colorado passed November 5, 1861, and in force at the time of the state’s admission, declared the rules of evidence of the common law to be binding on all courts and juries in criminal cases, save in some respects not here material. Laws Colo. 1861, p. 335. Sec. 145; Gen. Laws Colo. 1877, Sec. 821. The acts of Congress under which the state was admitted made it a judicial district, established courts of the United States

therein, and clothed them with criminal jurisdiction. To enable them to administer the criminal laws of the United States, it was essential that there should be some certain and established rules of evidence. Congress made no provision upon the subject, other than to declare that 'the laws of the United States not locally inapplicable shall have the same force and effect within the said state as elsewhere within the United States.' Act June 26, 1876, c. 147, Sec. 1, 19 Stat. 61 (U. S. Comp. St. 1901, p. 328). It is not material that there are here no known and established local rules in force in 1789 or 1790 which could have been contemplated by Congress when the judiciary and crimes acts were passed, for there was no purpose at that time, and could have been none, to make those acts operative in what is now the State of Colorado. But it is material that Colorado had known and established rules upon the subject at the time when those acts were subsequently fully extended to the new state, and given the same operation there which had been given to them in Virginia and other states at the time of their enactment. The situation incident to the admission of Colorado as a state, and the manner in which Congress dealt with it, were essentially the same as those shown in *United States v. Reid*, *supra*. Applying the principles of that decision, it is obvious that it was the purpose of Congress, save where it had legislated otherwise, or should do so in the future, to refer the courts of the United States in the new state to the known and established rules concerning evidence in criminal cases, which were in force in Colorado at the time when the judiciary and crimes acts were given the same operation in that state as in other states, which was when Colorado was admitted into the Union as a state. No law of the state enacted thereafter changing the rules of evi-

dence can affect criminal trials in the courts of the United States. Such was, in effect, the decision of the Supreme Court in *Logan v. United States*, 144 U. S. 263, 298, 303, 12 Sup. Ct. 617, 36 L. Ed. 429, which presented a similar question in respect of the State of Texas." (pp. 533-4.)

The same principle was announced in *United States v. Van Luvan*, 65 Fed. 78, where the testimony of accomplices was involved. The court held:

"At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the State of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the offense. I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury that they cannot convict upon the uncorroborated testimony of an accomplice; and when a case stands before a jury on that kind of evidence alone I assume the duty of charging them to return a verdict of not guilty, but, if the testimony of an accomplice is accompanied by evidence tending

to corroborate the same in its material statements, then it is the duty of the court to submit the whole to the jury, and it is for the jury to determine whether the corroborating evidence is of such a character and weight as justifies the jury in giving weight to the testimony of the accomplice" (p. 81).

The law of California at the time when that state was admitted into the Union (September 9, 1850), is found in the Statutes of 1849-50, Chap. 119, Section 405, page 304:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to convict the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense, or the circumstances thereof."

This was the substance of the requested instruction. In refusing it and in charging according to the common law, the trial judge committed prejudicial error.

Dated, San Francisco,

May 29, 1915.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

J. C. CAMPBELL,
*Of Counsel for Plaintiffs in Error
and Petitioners.*

